Supreme Court, U.S.
FILED

041382 APR 14 2005

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES MAXWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
JEFFREY P. SINGDAHLSEN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202)514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 2252A(a)(5)(B), which prohibits the knowing possession of child pornography "that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce," is unconstitutional, as exceeding Congress's Commerce Clause authority, as applied to respondent's intrastate possession of child pornography stored on computer disks that had traveled in interstate commerce.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	16
Appendix A	1a
Appendix B	57a

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Raich*, cert. granted, 124 S. Ct. 2909 (2004)	14
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	10
Perez v. *United States*, 402 U.S. 146 (1971)	10
Raich v. *Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (2004)	15
Sabri v. *United States*, 124 S. Ct. 1941 (2004)	11
The Lottery Cases (Champion v. *Ames)*, 188 U.S. 321 (1903)	11
United States v. *Angle*, 234 F.3d 326 (7th Cir. 2000), cert. denied, 533 U.S. 932 (2001)	8
United States v. *Corp*, 236 F.3d 325 (6th Cir. 2001)	13, 14
United States v. *Harris*, 358 F.3d 221 (2d Cir. 2004)	8, 12
United States v. *Holston*, 343 F.3d 83 (2d Cir. (2003)	12
United States v. *Kallestad*, 236 F.3d 225 (5th Cir. 2000)	8, 12
United States v. *Lopez*, 514 U.S. 549 (1995)	10, 11
United States v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003)	13, 14

Cases—Continued: Page

United States v. *Morrison*, 529 U.S. 598 (2000) 5, 11
United States v. *Robinson*, 137 F.3d 652 (1st Cir. 1998) 8
United States v. *Rodia*, 194 F.3d 465 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000) 8, 12
United States v. *Smith*, No. 03-13639, 2000 WL 628686 (11th Cir. Mar. 18, 2005) 13
Wickard v. *Filburn*, 317 U.S. 111 (1942) 6, 10

Constitution and statutes:

U.S. Const. Art. I, § 8:
Cl. 3 (Commerce Clause) 2, 3, 4, 9, 11
Cl. 18 11
Controlled Substances Act, 21 U.S.C. 801 *et seq.* 9
Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q) 10
18 U.S.C. 2251-2260 11
18 U.S.C. 2251(a) 9, 13
18 U.S.C. 2251(b) 9
18 U.S.C. 2252(a)(3)(B) 9
18 U.S.C. 2252(a)(4)(B) 9
18 U.S.C. 2252A(a)(4)(B) 9
18 U.S.C. 2252A(a)(5)(B) ..... *passim*

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES MAXWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-56a) is reported at 386 F.3d 1042.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2004. A petition for rehearing was denied on December 28, 2004 (App., *infra*, 57a-58a). On March 16, 2005, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. Title 18 of the United States Code, Section 2252A(a)(5)(B), provides:

> (a) Any person who—
>
> * * * * *
>
> (5) * * *
>
> (B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer
>
> * * * * *
>
> shall be punished [by fine and imprisonment].

18 U.S.C. 2252A(a)(5)(B).

STATEMENT

Following a jury trial, respondent was convicted in the United States District Court for the Middle District of Florida of two counts of knowingly possessing child

pornography that was "produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce," in violation of 18 U.S.C. 2252A(a)(5)(B). He was sentenced to 66 months of imprisonment. The court of appeals reversed respondent's convictions, holding that application of the statute to respondent's conduct exceeds Congress's authority under the Commerce Clause. App., *infra*, 1a-56a.

1. In May 2002, respondent James Maxwell rented a room in Alberta Wallace's apartment. During that time, respondent used Wallace's computer (with her permission) to access the Internet. In August 2002, respondent left the apartment to serve an unrelated state prison sentence. Before he left, he gave Wallace power of attorney to manage his affairs. He also gave Wallace access to his e-mail accounts. App., *infra*, 4a-6a.

After reviewing e-mails in respondent's account, Wallace became suspicious that respondent had accessed and possibly possessed child pornography, and she reported her suspicions to the police. Wallace subsequently authorized the Federal Bureau of Investigation (FBI) to search her apartment, including the laptop computer that respondent had used to access the Internet. Agents copied the contents of the computer's hard drive and seized a variety of storage media, including a zip disk. The zip disk, which was the basis for Count 1 of the indictment, contained more than 500 images of child pornography. App., *infra*, 4a, 6a-7a; Gov't C.A. Br. 4; Gov't Reh'g Pet. 2.

A few days after the search, Wallace discovered additional disks in a dresser drawer in respondent's bedroom and turned them over to the FBI. One of the disks (a floppy disk) contained approximately 15 images of child pornography. That disk became the basis for

Count 2 of the indictment. App., *infra*, 5a-6a; Gov't Reh'g Pet. 2.[1]

2. A federal grand jury in the Middle District of Florida returned an indictment charging respondent with two counts of knowingly possessing "child pornography * * * that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce," in violation of 18 U.S.C. 2252A(a)(5)(B). At trial, the government called two law enforcement officers to establish that the charged disks contained images of two actual, identifiable children. App., *infra*, 8a. The government also introduced a stipulation from respondent that the charged disks "were both manufactured outside the State of Florida and have been mailed, shipped or transported in interstate commerce." *Id.* at 11a. The jury found petitioner guilty on both counts of the indictment. *Id.* at 12a.

In a post-trial motion, respondent argued that Section 2252A(a)(5)(B) was unconstitutional, facially and as applied to his own conduct, because the statute's ban on intrastate possession of child pornography exceeded Congress's authority under the Commerce Clause. The district court denied the motion, holding that the statute is constitutional its face and as applied in this case. See App., *infra*, 20a n.13; Gov't C.A. Br. 8-9.

3. The court of appeals reversed, holding that Congress lacks constitutional authority to prohibit the

---

[1] In addition to the two disks charged in the indictment, government agents found a CD-Rom, two more zip disks, and 13 more floppy disks containing child pornography. Agents also found nine images of child pornography in temporary Internet folders on Wallace's computer. App., *infra*, 10a-11a.

conduct for which respondent was convicted. App., *infra*, 1a-56a.[2]

The court of appeals framed the question before it as whether possession of child pornography "substantially affects interstate commerce" when the only proven nexus between the defendant's conduct and interstate commerce is that the pornographic images are stored on disks manufactured outside the State of possession. App., *infra*, 25a-26a. To resolve the constitutional question, the court looked to the four considerations identified in *United States* v. *Morrison*, 529 U.S. 598, 609-613 (2000):

> 1) whether the statute in question regulates commerce or any sort of economic enterprise; 2) whether the statute contains any express jurisdictional element which might limit its reach to a discrete set of cases; 3) whether the statute or its legislative history contains express congressional findings that the regulated activity affects inter-

---

[2] Before addressing respondent's constitutional arguments, the court of appeals held, *inter alia*, that respondent's conduct was covered by 18 U.S.C. 2252A(a)(5)(B). See App., *infra*, 15a-19a. Although respondent stipulated that the computer disks on which the pornographic images were stored had traveled in interstate commerce, he argued that Section 2252A(a)(5)(B)'s jurisdictional element was not satisfied because the images had not been "produced" by the disks. *Id.* at 16a. Rather, respondent contended, "the materials that 'produce[]' pornography in satisfaction of the statute's jurisdictional element only include cameras, film, and similar devices." *Ibid.* The court of appeals rejected that argument, holding that, under the statute, "possessors of child pornography cannot legally use materials that traveled in interstate commerce to copy illicit images and thereby create independent contraband, even if the images were originally photographed in-state with cameras and film manufactured within the state's borders." *Id.* at 18a.

> state commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated.

App., *infra*, 26a (internal quotation marks omitted). The court found that each of those considerations supported its determination that Section 2252A(a)(5)(B) is unconstitutional as applied to respondent's conduct. See, *e.g.*, *id.* at 51a.

a. The court of appeals found that there is "nothing commercial or economic about the possession of child pornography, even if that pornography is saved on computer disks that were imported from out-of-state." App., *infra*, 27a. The court of appeals distinguished this Court's decision in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), on the ground that the federal law at issue in *Wickard* "constituted a civil scheme directed at controlling the cost and flow of rival goods in the marketplace." App., *infra*, 28a; see *id.* at 27a-29a. By contrast, the court stated, Congress in enacting 18 U.S.C. 2252A(a)(5)(B) was "clearly not concerned with the supply of child pornography for the purpose of avoiding surpluses and shortages or for the purpose of stimulating its trade at increased prices," but was instead "attempt[ing] to regulate primary conduct directly, even within state borders." App., *infra*, 29a; see *id.* at 30a (court of appeals states that "the noneconomic, criminal nature of [respondent's] conduct is central to [its] decision").

b. The court of appeals found that respondent's conduct had no more than an attenuated effect on interstate commerce. App., *infra*, 30a-38a. The court found "no record evidence that [respondent] was a potential child molester or that his conduct would likely increase the creation and distribution of child pornography elsewhere, much less to the extent that such creation and

distribution would have a substantial effect on interstate commerce." *Id.* at 32a-33a. The court also concluded that, in light of the noncommercial character of the conduct proscribed by Section 2252A(a)(5)(B), the constitutional analysis should focus on the impacts of respondent's own behavior, rather than on the aggregate effects of all intrastate possession of child pornography. *Id.* at 33a-38a.

c. The court of appeals found that the jurisdictional element on which the government relied—*i.e.*, that the child pornography "was produced using materials" that had traveled in interstate commerce, 18 U.S.C. 2252A(a)(5)(B)—did not render the statute constitutional. App., *infra*, 38a-42a. To affect the Commerce Clause analysis, the court stated, "a statute's jurisdictional element [must be] sufficiently restrictive to cabin the statute's reach to permissible applications." *Id.* at 39a. The court of appeals concluded that the "produced using materials" jurisdictional element of Section 2252A(a)(5)(B) "fails to limit the reach of the statute to any category or categories of cases that have a particular effect on interstate commerce" because that jurisdictional language "encompasses virtually *every* case imaginable." *Id.* at 40a (internal quotation marks omitted).

d. The court of appeals found that the relevant congressional findings and legislative history failed to establish a constitutionally sufficient nexus between the regulated conduct and interstate commerce. App., *infra*, 42a-50a. The court acknowledged the presence of legislative findings that an extensive interstate market in child pornography exists, that trafficking in such materials increases demand for the creation and distribution of additional child pornography, and that Congress viewed the ban on possession of child porno-

graphy as a means to eliminate that market. See, *e.g.*, *id.* at 43a-46a n.22, 48a & n.24. The court concluded, however, that "little can be gleaned from these findings about the impact of child pornography on interstate commerce, and particularly the impact of possessing child pornography intrastate. Instead, the vast majority of the findings support the broader proposition that child pornography * * * is bad and harmful to children." *Id.* at 46a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that 18 U.S.C. 2252A(a)(5)(B), which prohibits the knowing possession of child pornography "that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce," is unconstitutional as applied to respondent's intrastate possession of hundreds of images of child pornography stored on computer disks that previously traveled in interstate commerce. The court's decision is erroneous, and it seriously undermines Congress's comprehensive scheme to eliminate the interstate market in child pornography.

The Eleventh Circuit's decision also conflicts with decisions of other courts of appeals that have sustained the constitutionality of federal laws banning the possession of child pornography that was "produced using materials" that have traveled in interstate commerce. See, *e.g.*, *United States* v. *Robinson*, 137 F.3d 652, 656 (1st Cir. 1998); *United States* v. *Harris*, 358 F.3d 221, 222-223 (2d Cir. 2004); *United States* v. *Rodia*, 194 F.3d 465, 474-482 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000); *United States* v. *Kallestad*, 236 F.3d 225, 228-231 (5th Cir. 2000); *United States* v. *Angle*, 234 F.3d 326,

337-338 (7th Cir. 2000), cert. denied, 533 U.S. 932 (2001).[3]

The question whether Section 2252A(a)(5)(B) is constitutional as applied to the intrastate possession of child pornography is an important one that may ultimately warrant plenary review by this Court. On November 29, 2004, however, the Court heard argument in *Ashcroft* v. *Raich*, No. 03-1454, which involves an analogous as-applied constitutional challenge to the Controlled Substances Act, 21 U.S.C. 801 *et seq.* This Court's decision in *Raich* may significantly influence the analysis of the issue in this case. Accordingly, the petition should be held pending this Court's decision in *Raich* and then disposed of as appropriate in light of that decision.

1. a. The Commerce Clause grants Congress the power to regulate an entire class of activities that substantially affects interstate commerce, even if the commercial effect of an individual instance within the class is slight. "[W]here *a general regulatory statute*

---

[3] The majority of the cases cited in the text involved prosecutions under 18 U.S.C. 2252(a)(4)(B) rather than under Section 2252A(a)(5)(B). Sections 2252(a)(4)(B) and 2252A(a)(5)(B) use somewhat different language in defining the categories of visual depictions whose possession is prohibited. Both provisions, however, categorically bar possession of child pornography that was "produced using materials" that had previously traveled in interstate commerce. See App., *infra*, 19a n.11 ("Although [18 U.S.C. 2252(a)(4)(B)] contains different language in part, the terms of its jurisdictional requirement are identical to those of § 2252A, the statute under which [respondent] was convicted."). For purposes of the constitutional question presented in this case, the two provisions therefore stand or fall together. Similar jurisdictional language is found in other provisions of the child pornography statutes. See, *e.g.*, 18 U.S.C. 2251(a), 2251(b), 2252(a)(3)(B), 2252A(a)(4)(B); note 4, *infra*.

bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)); accord *Perez* v. *United States*, 402 U.S. 146, 154 (1971) ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.") (citations and internal quotation marks omitted).

That principle is illustrated by *Wickard* v. *Filburn*, 317 U.S. 111 (1942), in which the Court upheld federal regulation of wheat grown and consumed on a family farm in order to control the volume of wheat moving in interstate and foreign commerce. *Wickard* establishes that even non-commercial activity occurring within a regulated market is subject to Congress's commerce power. As this Court explained in *Lopez*, the wheat production that Congress regulated in *Wickard* was economic activity, even though it was produced for personal use and "may not be regarded as commerce." *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 125).

Wickard thus establishes that intrastate activity is subject to Congress's commerce power, even though the activity itself may not be commercial, if regulation of that activity is reasonably necessary to achieve Congress's regulatory objectives with respect to an interstate market. In distinguishing the statute at issue in *Wickard* from the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), the Court in *Lopez* explained that "*Wickard* * * * involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560. The Court further explained that Section 922(q) was not "an essential part

of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561; see *United States* v. *Morrison*, 529 U.S. 598, 610 (2000).

b. The Eleventh Circuit in this case held that *Wickard* has no application to the intrastate possession of child pornography for purported personal use because, in the court's view, that class of conduct neither involves economic activity nor substantially affects interstate commerce. See, *e.g.*, App., *infra*, 27a-35a. That conclusion is fundamentally flawed.

Section 2252A(a)(5)(B)'s possession ban is an integral part of a comprehensive statutory scheme designed to eradicate the interstate market in child pornography. In 18 U.S.C. 2251-2260, Congress has broadly addressed the manufacture, distribution, and possession of child pornography. There exists a substantial, albeit illicit, market in child pornography, and it has been established at least since *The Lottery Cases* (*Champion* v. *Ames*), 188 U.S. 321 (1903), that the power to regulate commerce includes the power to attempt to eliminate an interstate market entirely. Congress could reasonably determine that regulation of the intrastate possession of child pornography is a necessary and proper measure to ensure the effectuation of its comprehensive regulation of the interstate market, a matter that falls squarely within its authority under the Commerce Clause. U.S. Const. Art. I, § 8, Cls. 3, 18; cf. *Sabri* v. *United States*, 124 S. Ct. 1941, 1946 (2004). As the Fifth Circuit has explained:

> Congress determined that an interstate market in child pornography exists. No one questions Congress's authority to regulate that market directly. Unlike the rape at issue in *Morrison*, the possession of child pornography interacts with a national

> market on both the supply and demand side. Applying the commerce power, read through the Necessary and Proper Clause, Congress can reach purely local possession if it rationally determines that doing so is necessary to effectively regulate the national market.

Kallestad, 236 F.3d at 230.

The court of appeals' attempt to minimize the link between intrastate possession and the nationwide market in child pornography ignores the fact that local acts of possession can increase the economic incentives for interstate supply of child pornography. The court of appeals' reasoning is especially misconceived in light of the potential difficulty of proving that a particular pornographic image has traveled across state lines. See, *e.g.*, *Kallestad*, 236 F.3d at 230 ("[B]ecause it may often be impossible to determine whether a specific piece of child pornography has moved in interstate commerce[,] * * * Congress could rationally determine that banning purely local possession was a necessary adjunct to its effort to ban interstate traffic."); *Harris*, 358 F.3d at 222 (explaining that regulation of intrastate possession is supported by the fact that "much of the child pornography that concerned Congress is homegrown, untraceable, and enters the market surreptitiously") (quoting *United States* v. *Holston*, 343 F.3d 83, 90 (2d Cir. 2003)); *Rodia*, 194 F.3d at 479 (because "it may be difficult to ascertain whether pornography found in an individual's home was produced by that individual, acquired from a friend intrastate, or purchased in interstate commerce[,] * * * child pornography cannot be effectively regulated without federal control over both the interstate and local versions of the activity."). In the instant case, for example, a government witness testified that one of the minors

depicted on the charged disks was from Texas —a fact suggesting that the pornographic image had moved interstate before respondent possessed it in Florida —but such prior interstate transport could not be established definitively because the witness was unable to identify the site where the photographs were taken. See App., *infra*, 8a. The government's inability to prove beyond a reasonable doubt that a particular visual depiction has previously moved in interstate commerce (or that it is possessed with the intent to sell or otherwise distribute it) does not mean that the depiction is in fact unconnected to the interstate market in child pornography.

2. The court of appeals' decision invalidates important applications of a statute that is vital to the government's efforts to suppress the production, dissemination, and possession of child pornography.[4] Unlike *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003), and *United States* v. *Corp*, 236 F.3d 325 (6th Cir. 2001), the decision in this case is not limited to idiosyncratic factual settings; rather, this case involves the core conduct that Congress sought to prohibit in enacting

---

[4] The Eleventh Circuit recently extended its ruling in the instant case to the similar jurisdictional language of 18 U.S.C. 2251(a), which prohibits the use of minors in the production of child pornography that is "produced using materials" that have traveled in interstate commerce. See *United States* v. *Smith*, No. 03-13639, 2005 WL 628686 (11th Cir. Mar. 18, 2005). In reversing the defendant's conviction for producing child pornography, the court of appeals in *Smith* found "no constitutionally significant distinctions" between the possession and production offenses with respect to the validity of the "produced using materials" jurisdictional element, *id.* at *13, and concluded that "*Maxwell*'s reasoning * * * applies here and that Smith's conduct is beyond the power of Congress to proscribe," *id.* at *16.

Section 2252A(a)(5)(B).[5] Respondent possessed hundreds of pornographic images of minors to whom he had no evident personal connection.

The importance of the possession ban to the overall statutory scheme, and the square conflict between the Eleventh Circuit's constitutional ruling and those of other courts of appeals (see pp. 8-9, *supra*), would normally justify plenary review of the decision below. On June 28, 2004, however, this Court granted the government's petition for a writ of certiorari in *Ashcroft* v. *Raich*, 124 S. Ct. 2909 (No. 03-1454) (argued Nov. 29, 2004), to consider the following question:

> Whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, exceeds Congress's power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported personal "medicinal" use or to the distribution of marijuana without charge for such use.

03-1454 Pet. at (I).

Raich and the instant case have several features in common.[6] Both cases involve illegal commodities that

---

[5] The child pornography at issue in *McCoy* consisted of a single photograph of the defendant and her ten-year-old daughter, side-by-side with their genitals exposed. See 323 F.3d at 1115, 1122, 1132. The court of appeals limited its constitutional holding to "McCoy's circumstances and those of others similarly situated." *Id.* at 1131. The child pornography possessed by the 23-year-old defendant in *Corp*, see 236 F.3d at 326, consisted of depictions of his 17-year-old girlfriend, "who was merely months away from reaching majority," *id.* at 333.

[6] In holding the Controlled Substances Act unconstitutional as applied to the intrastate possession and uncompensated distribution of marijuana, the Ninth Circuit in *Raich* relied heavily on its prior decision in *McCoy* (see p. 13 & note 5, *supra*), which had sustained an as-applied constitutional challenge to the federal child

are typically acquired through economic transactions. With respect to both commodities, it may be difficult to determine whether particular items of contraband have previously traveled in interstate commerce or are intended for future sale or other distribution. Compare pp. 12-13, *supra*, with 03-1454 Gov't Br. at 28-30. Congress has sought to eliminate the markets in both marijuana and child pornography by comprehensively addressing the production, distribution, and possession of those items. And in both *Raich* and the instant case, the court of appeals held that the statutory possession ban is unconstitutional as applied to a class of purportedly non-commercial possession. This Court's decision in *Raich* is therefore likely to shed significant light on the proper disposition of respondent's as-applied constitutional challenge to 18 U.S.C. 2252A(a)(5)(B).

---

pornography laws. See *Raich* v. *Ashcroft*, 352 F.3d 1222, 1228-1233 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (2004).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Ashcroft* v. *Raich*, No. 03-1454 (argued Nov. 29, 2004), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
JEFFREY P. SINGDAHLSEN
Attorney

APRIL 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14326

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES MAXWELL, DEFENDANT-APPELLANT

Filed: Oct. 1, 2004

Before: EDMONDSON, Chief Judge, and TJOFLAT and COX, Circuit Judges.

TJOFLAT, Circuit Judge:

A jury found James Maxwell guilty of two counts of knowingly possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).[1] As a jurisdictional element

---

[1] That section of the statute provides,

> Any person who . . . knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer . . . shall be punished as provided in subsection (b).

Definitions of § 2252A's terms are contained in 18 U.S.C. § 2256. We reprint § 2256, as it read at the time of Maxwell's indictment, below. The section was amended just days before Maxwell's trial, *see* Pub.L. No. 108–21, tit. V, § 502(a) to (c), 117 Stat. 678, 679 (2003), but the amendments are of no moment in this case.

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced

of the offense, that statute required the Government to prove that the child pornography, or at least the material that produced it, traveled in interstate commerce. At Maxwell's trial, the Government did not establish that the child pornography moved across state lines. Consequently, its case relied on establishing that the images were *produced* by materials that did.

---

by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and

(9) "identifiable minor"—

(A) means a person—

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

18 U.S.C. § 2256 (1996) (amended 2003).

Maxwell appeals his convictions on four grounds. The first three grounds are insufficient to warrant reversal. The fourth ground is that the application of § 2252A(a)(5)(B) to the facts of his case amounts to an unconstitutional exercise of the Commerce Clause. That ground has merit and requires that we reverse Maxwell's convictions.

I.

Maxwell rented a room in Alberta Wallace's apartment in St. Petersburg, Florida from May until August of 2002. During that time, Maxwell used Wallace's computer to access the Internet, and she had access to Maxwell's mail and computer accounts. Wallace eventually grew suspicious that Maxwell was interested in homosexual Internet activity, some involving children, and she contacted the police about her concerns.

Wallace allowed the Federal Bureau of Investigation to search her apartment. FBI agents copied the contents of Wallace's computer hard drive and seized almost 140 items. Most of these items consisted of computer disks and film taken from Maxwell's room. One item was a zip disk[2] containing several hundred images of child pornography.

---

[2] Special Agent Keith Arndt of the FBI, a specialist in examining evidence on computers and other digital media, described zip disks at Maxwell's trial. According to Arndt, zip disks are removable devices that are used to store computer files, much like standard floppy disks. The technology that facilitates storage is slightly different for zip disks than it is floppy disks, and zip disks therefore can only be used in computers that are equipped with a zip drive. Zip disks are capable of storing substantially more information than floppy disks.

Subsequent to the search, Wallace found additional disks in a drawer in Maxwell's room, and she turned them over to the FBI. One was a floppy disk containing about fifteen images of child pornography.

In January 2003, a grand jury indicted Maxwell on two counts of possessing child pornography in violation of 18 U.S.C. § 2252A. Count I was predicated on the zip disk described above. Count II was predicated on the floppy disk. (We refer to these two disks collectively as "the charged disks.")

Maxwell was arraigned in February, pled not guilty, and stood trial in May. The Government presented the testimony of Wallace and several law enforcement officials from various agencies.

Wallace testified that she knew Maxwell from church and dated him briefly after her husband passed away. They stopped dating after a short time, in part because Wallace was offended when she learned that Maxwell was living with an unmarried couple that engaged in sexual relations (with one another, not Maxwell). By the time Maxwell moved in to Wallace's apartment, he and Wallace were merely platonic friends and slept in different rooms. No one else had a key to the apartment or stored possessions there. At first, Maxwell accessed the Internet with his own computer, but he began using Wallace's computer, with her permission, after his Internet service was disconnected. In August 2002, Maxwell moved out of the apartment.[3] He gave

---

[3] Maxwell left Wallace's apartment to serve a prison sentence for an unrelated state offense, but Wallace was not asked to explain this reason for Maxwell's absence in front of the jury. Maxwell intended to return to the apartment following his release. Because of Wallace's concerns and the events that followed, however, he never did return.

Wallace power of attorney to manage his personal affairs for the time he would be gone. She had access to his bank account and paid bills for Maxwell's various expenses, including moving and cell phone expenses. Maxwell also gave Wallace access to his personal post office box and e-mail accounts. Around the beginning of September, in the course of her stewardship, Wallace says she discovered e-mail messages involving homosexuality and teenagers in Maxwell's accounts. When Wallace questioned him about those messages, he became angry, and the two never spoke to one another prior to Maxwell's trial. In October, Wallace contacted the police about her suspicions that Maxwell accessed (and possibly possessed) child pornography. She allowed the FBI to search Maxwell's former room and observed agents seizing items that Maxwell had moved into that room. Wallace testified that she had two filing cabinets of her own in Maxwell's room, but they only contained materials she used for teaching. She stored no computer disks of her own in Maxwell's room (in the filing cabinet or otherwise) and never used Maxwell's disks. Furthermore, Wallace never gave anyone else (other than the FBI) access to Maxwell's room or computer disks. In addition to the room, Wallace permitted the FBI to examine some of her belongings, including the laptop computer Maxwell used to access the Internet. Wallace testified that she never viewed child pornography on that computer and never let anyone other than Maxwell use it. A few days after the FBI search, Wallace found some additional computer disks that she identified as belonging to Maxwell and forwarded them to the FBI. She never used those disks or allowed others to use them.

The Government introduced into evidence a wide array of physical exhibits, including the charged disks. The zip disk, corresponding to Count I, was admitted as Government Exhibit 5A. Its label, which was published to the jury, contained the following handwritten words: "adult and young," "pre teens," "piss," "shaved," and "pierced." The word "animals" also appeared but had been crossed out. The floppy disk, corresponding to Count II, was admitted as Government Exhibit 7. Although these two disks—along with several others that were not charged in Maxwell's indictment—were admitted as physical exhibits, the court precluded the jury from viewing their contents with this exception: the Government was permitted to offer into evidence as separate exhibits hard copies made of portions of the disks. Some of the hard copies were images of child pornography. The court permitted the Government to admit a total of ten such hard copy images from all of the disks in evidence, and the Government chose to introduce images from the two charged disks only (even though other admitted disks in evidence also contained pornographic images).[4]

Agent Philippe Dubord of the Hillsborough County Sheriff's Office was assigned to the "Innocent Images Task Force" with the FBI and investigated Maxwell's case. Dubord identified and described the charged disks, along with corresponding exhibits showing information about the files contained on those disks (such as the names of the files, when they were saved on the respective disks, when they were last accessed, and the names of the directories in which they were stored).

---

[4] Although the prosecution did not show the jury images contained on the uncharged disks, it did elicit testimony that those disks contained images of child pornography.

The names of the folders in which some of the images were saved included "adult," "young," and "pre teen." On cross-examination, Dubord conceded that neither of the charged disks contained files bearing Maxwell's name or picture (although such contents did appear on other disks that were found among Maxwell's possessions).

Other prosecution witnesses identified two of the persons depicted on the charged disks as minor children, one from Florida and the other from Texas. Special Agent Susan Koteen of the Florida Department of Law Enforcement testified that she recognized the physical surroundings shown in the images involving the Florida child. She identified them as the child's home, located in Howie–in–the–Hills, a small town in Lake County, Florida. Detective–Sergeant Katherine Davis of Angleton, Texas identified the Texas child but could not determine where the photographs were taken.

As additional circumstantial evidence that Maxwell knowingly possessed pornographic images, the Government introduced a recording of a phone conversation between Maxwell and his pastor, Linda Sessler.[5] The Government played the recording at trial and distributed a transcript of its contents to the jury. Maxwell initiated the phone call on November 10, 2002 (three days before the FBI searched Wallace's apartment) from the Hillsborough County jail, where he was being

---

[5] This evidence was admitted through the testimony of Katherine Cochran of the Hillsborough County Sheriff's Office, who monitored the telephone system at the Hillsborough County Jail used by inmates there. Cochran explained that all inmate phone calls were recorded and that warnings to that effect were visibly posted near the prison phones.

held on unrelated charges. During the call, Sessler indicated that law enforcement officials planned to search his belongings at Wallace's apartment. Maxwell responded,

> Well do me a favor . . . umm, get my floppy disk and all of my zip disks from [Wallace]. 'Cause some of it I have recipes and stuff on and, and some of them I had started journals and stuff. And some stuff I have that was long before genesis and stuff. But just get all of that stuff. But I can, some of I can't remember what it is. And some of it I have been wiping out some of the disks. And uhh, just get all of that stuff and put it somewhere.

(Ellipses in original). Sessler asked if the materials to which Maxwell was referring were labeled. He replied,

> It was just a big box. It had a bunch of floppy disks. And then there was the zip disks that are about the size of a floppy they're just a little bit bigger. It doesn't have anything to do with uhh, anything that they were talkin' about. But as you had said there's no more problems needed and so that would alleviate that. But I was, I woke up in the middle of the night and last night I was sick, I had a fever and everything. I don't know what was going on. . . . And I said let me ask you about that again. And just ask you to do that. But just all of my floppy disks and my zip disks. Just take them and just put 'em somewhere.

Sessler indicated doubt about this instruction and surmised to Maxwell that law enforcement authorities were "just tryin' to see if they can find anything." Maxwell agreed. He said,

> Right, well that's why, that's why . . . that would just solve any problems that might would come up. Like you said, like if they totally had to have a [unintelligible] come in and look but in case they don't or in case they do, you know . . . it keep the problems down.

(Both ellipses and alteration in original).

Over Maxwell's objection, the Government also introduced a plethora of testimony and exhibits into evidence concerning Maxwell's conduct beyond his possession of the charged disks. This evidence concerned several other computer disks containing depictions of child pornography that were seized from Wallace's home but were never charged against Maxwell in his indictment (collectively, the "uncharged evidence"). These materials consisted of a CD–Rom, two zip disks, and thirteen floppy disks. The uncharged evidence also included testimony and exhibits concerning Maxwell's e-mail accounts with online services including Yahoo and MSN Hotmail. The Government introduced records supplied by Yahoo indicating that Maxwell established a user profile under the name "boy lover 69 69."[6] Dubord testified about evidence indicating that Maxwell had accessed a Yahoo Internet group where files could be shared among users.[7] Although Dubord

---

[6] User profiles connected to an Internet account are like online identities created by the account user. Other Internet "surfers" can learn about the account user by reading his profile, and they can often contact him through it or share files with him if they so desire.

[7] According to Agent Dubord, Internet "groups" are websites "where people have a common interest where they . . . meet and chat, post messages, . . . share pictures, . . . [and] interact

could not access the files stored on that group's website and could not say for certain whether Maxwell did, Dubord observed that the website contained three folders that were associated with Maxwell's account and entitled "boys," "boys 2," and "boys 3." The Government also introduced testimony and evidence about certain messages Maxwell received on his MSN Hotmail account. These messages contained subject lines suggesting that Maxwell had become a member of Internet groups named "Rex's place for gay/bi boys:)"; "gay and bi boys (teens)"; and "Daily Digest for gay&bi teen guys." Dubord could not say however, whether Maxwell ever accessed these groups after becoming a member. Finally, Dubord testified about nine uncharged images of child pornography discovered in temporary Internet folders on Wallace's computer.[8]

Before it rested its case-in-chief, the Government asked the court to read a stipulation to the jury concerning the purported relationship between Maxwell's charges and interstate commerce. The court complied and informed the jury as follows:

> It is stipulated and agreed between the parties that the computer zip disk that is the basis for Count 1 of the Indictment, and the computer floppy disk that is the basis for Count 2 of the Indictment, were both manufactured outside the State of Florida and have

---

basically." Dubord testified that the title of an Internet group will often identify the group's interests.

[8] Software programs that facilitate Internet use often store information accessed on the Internet on the user's computer in temporary folders. The programs typically create these folders automatically and without the user's direction.

been mailed, shipped or transported in interstate commerce.

The Government then rested. Maxwell put on no defense and also rested.[9]

On May 7, 2003, after approximately two hours of deliberation, the jury returned a verdict finding Maxwell guilty of Counts I and II. On August 12, the court sentenced him to a total of sixty-six months in prison.[10]

II.

Maxwell appeals his convictions on four distinct grounds. We address each in turn in Subparts A. through D. below. We begin with Maxwell's nonconstitutional arguments. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 1323, 99 L. Ed. 2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). Because none of these arguments permit us to dispose of Maxwell's appeal, we proceed to his constitutional argument.

A.

First, Maxwell contends that the uncharged images and evidence concerning his Internet activity should not have been admitted into evidence. We review a district court's evidentiary rulings for abuse of discre-

---

[9] Maxwell did, however, move for a judgment of acquittal pursuant to Fed. R. Crim. P. 29. The court denied the motion.

[10] He received sixty-month term for Count I and an additional six-month term for Count II. The court specified that the terms would run consecutively.

tion. *United States v. Dodds*, 347 F.3d 893, 897 (11th Cir. 2003). "A district court abuses its discretion if it misapplies the law or makes findings of fact that are clearly erroneous." *Ambrosia Coal & Constr. Co. v. Pages Morales*, 368 F.3d 1320, 1332 (11th Cir. 2004) (citations omitted).

The district court found that the uncharged evidence was admissible under Rule 404(b) of the Federal Rules of Evidence. That rule provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Without question, the uncharged evidence was probative of Maxwell's knowledge and intent. Therefore, the district court did not abuse its discretion in admitting it.

B.

Maxwell next argues the evidence against him was insufficient to establish that he *knew* that the charged disks contained images of child pornography. Knowledge is an element of the charged offenses. *See* 18 U.S.C. § 2252A(a)(5)(B) (establishing criminal liability

for any person who "knowingly possesses" material "that contains an image of child pornography").

We review challenges to the sufficiency of the evidence *de novo*. *United States v. Alaboud*, 347 F.3d 1293, 1296 (11th Cir. 2003). In so doing, we view the evidence in the light most favorable to the Government, taking all reasonable inferences and credibility determinations reached in the Government's favor. *Id.*

Because Maxwell chose not to testify, evidence of his knowledge was necessarily circumstantial. The Government presented considerable circumstantial evidence of Maxwell's knowledge. First, Wallace and Agent Dubord indicated that the disks were found in Maxwell's room among Maxwell's possessions. Some of the disks contained labels such as "adult and young" and "pre teens," suggesting that the disks' owner knew they contained files concerning children. Wallace testified that she did not plant the disks in that room, did not use the disks, and did not allow others access to the room. Finally, when she broached the subject of her suspicion to Maxwell, he responded with anger, not surprise. This testimony, coupled with evidence about the location, appearance, and contents of the disks, might have been sufficient to establish Maxwell's knowing possession. But the Government did not stop there.

As described in Part I.B *supra*, the Government also presented ample evidence of Maxwell's interest in pornography, including "pre teen" pornography. The Government showed that Maxwell joined pornographic Internet groups with names and file directories suggesting an interest in "boys." Maxwell identified himself in at least one of these groups as "boy lover69 69." The Government also showed that child pornography had been accessed online from Wallace's computer,

which Maxwell had used, and that numerous disks containing child pornography, other than the charged disks, were found among his possessions. The jury could have inferred from this evidence that Maxwell had an interest in child pornography and that his possession of the two charged disks was not accidental or unknowing.

Finally, the Government introduced compelling evidence of a phone conversation between Maxwell and his pastor. Just days before the search of Wallace's apartment, Maxwell instructed his pastor to remove evidence, including floppy disks and zip disks in particular, from the scene. A reasonable factfinder could have inferred from this conversation, especially in light of the other evidence, that Maxwell knew that the charged disks contained child pornography.

The jury might have disregarded some of this evidence as unreliable; it might have accepted some of the evidence but decided that it did not support a finding that Maxwell knew about the illicit images. Ultimately, however, the jury was persuaded that Maxwell knowingly possessed child pornography. It does not matter whether we would have reached the same finding based on the same evidence. It only matters that the jury's finding was reasonable. Because it obviously was, Maxwell is not entitled to relief on this ground.

C.

Maxwell's third argument is that his convictions rest upon a misconstruction of the term "produced" within the meaning of the statute on which his convictions were based. To prosecute Maxwell successfully under that statute, the Government had to prove beyond a reasonable doubt that Maxwell

> knowingly possess[ed a] book, magazine, periodical, film, videotape, computer disk, or any other material that contain[ed] an image of child pornography [1] that [was] mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or [2] that was *produced* using materials that [were] mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer.

18 U.S.C. § 2252A(a)(5)(B) (emphasis added). Because the Government did not establish that the pornographic images moved across state lines, its case relied entirely on establishing that the materials that "produced" the disks containing the images moved across state lines.

As explained above, the Government proved that Maxwell knowingly possessed one zip disk and one floppy disk containing images of child pornography. The Government did not establish that Maxwell knowingly possessed cameras or similar devices that were used to capture the original depictions stored on these disks.

Although Maxwell stipulated that the charged disks traveled in interstate commerce before they contained the illegal images, *see* Part I.B *supra*, he argues that those disks did not "produce[]" pornographic images. Disks, Maxwell contends, are nothing more than storage media, and their transportation in interstate commerce is irrelevant to § 2252A(a)(5)(B)'s jurisdictional element. Maxwell suggests that the materials that "produce[]" pornography in satisfaction of the statute's jurisdictional element only include cameras, film, and similar devices that are used to give "being, form, or shape" to the original images. Maxwell insists that, because the Government showed only that he

stored images, as opposed to producing them, his convictions must be reversed.

We cannot agree. Maxwell's disingenuous reading of the statute ignores the statute's plain language. That language directs the word "produced" to *media containing illegal images*, rather than some abstract conception of images divorced from that media. As the statute makes clear, possessing a computer disk containing child pornography is no different than possessing a magazine that contains child pornography. 18 U.S.C. § 2252A(a)(5)(B). In a case charging possession of a pornographic magazine, certainly the Government could establish that the magazine was produced with materials that traveled in interstate commerce by demonstrating that the pornographic images contained therein were photographed by a camera imported from out of the state or country. But the camera would not be the Government's only recourse. The Government would show that other materials were also used to create the magazine, including film, paper, a printing press, glue or staples, and quite possibly a computer. If the Government established that any of those materials "ha[d] been mailed, or shipped or transported in interstate or foreign commerce by any means," then the Government would have met the burden required by the text of § 2252A(a)(5)(B).

This understanding of the statute yields a logical consequence: the production of any pornographic material that is prohibited by the statute such that it could not legally travel in interstate commerce constitutes production that satisfies the statute's jurisdictional requirement. Whether that material is the original depiction or a copy is irrelevant. Thus, while describing child pornography in written prose or

storing it in a paper envelope would not amount to production, duplicating that pornography—in printed or electronic format—would. By the terms of the statute (momentarily setting aside the distinct question of the statute's validity), possessors of child pornography cannot legally use materials that traveled in interstate commerce to copy illicit images and thereby create independent contraband, even if the images were originally photographed in-state with cameras and film manufactured within the state's borders. Nor can they cleanse the taint of an image taken with a camera that traveled in interstate commerce simply by destroying the original film and image, and retaining only copies that were made with equipment manufactured in-state. Ultimately, the contraband item on which the charge is based—be it a photograph or computer disk, an original or duplicate—could not have been "produced" without the camera, film, and the tangible medium on which it was printed, written, displayed, or copied.

If there is a difficult case as to what materials "produced" contraband media containing images of child pornography, it is not Maxwell's case. He was indicted for possessing two disks containing child pornography. This proscribed media was "produced" with numerous materials, including a camera, computers disks, and, presumably, a computer. Here, the Government proved by stipulation that the computer disks used to produce the bases for Maxwell's indictment traveled in interstate commerce. As far as the text of the statute is concerned, then, the Government met its burden. *See, e.g., United States v. Angle,* 234 F.3d 326, 341 (7th Cir. 2000) ("We believe . . . that computerized visual depictions (i.e., computer graphic files) are 'produced' when computer equipment, including computer disk-

ettes, are used to copy the depictions onto the diskettes that have traveled in interstate commerce.").[11]

D.

Maxwell's final and most forceful argument is that Congress could not have enacted § 2252A such that it would apply here without exceeding the scope of its legislative authority. For that reason, Maxwell argues, § 2252A is unconstitutional as it has been applied in his particular case.[12]

---

[11] This decision and many others we discuss have addressed statutes similar to the one at issue, most prominently including 18 U.S.C. § 2252(a)(4)(B). That statute provides,

> Any person who . . . knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

Although this statute contains different language in part, the terms of its jurisdictional requirement are identical to those of § 2252A, the statute under which Maxwell was convicted.

[12] We do not reach the question of whether § 2252A is facially invalid. Although Maxwell attacked the statute on its face in the district court, his argument on appeal is confined to an as-applied challenge.

We review district court conclusions as to the constitutionality of a challenged statute *de novo*.[13] *See, e.g.*,

---

[13] The Government contends that Maxwell failed to preserve this issue for appeal and that we are, therefore, limited to review it for plain error. The Government is wrong. At the close of the evidence, Maxwell made an oral motion under Fed. R. Crim. P. 29(a) for a judgment of acquittal. We agree it is debatable whether he challenged § 2252A's constitutionality at that time. Within seven business days of his convictions, however, Maxwell filed a written renewed motion for judgment of acquittal. *See* Fed. R. Crim. P. 29(c). In that motion, Maxwell explicitly argued that "18 U.S.C. § 2252A(a)(5)(B) is unconstitutional on its face and as applied to his case, since Congress exceeded its authority under the Commerce Clause by making the intrastate possession of child pornography a federal crime." Thus, there can be no question that the constitutional issue before us—now limited to an as applied challenge—was properly preserved in the district court.

The Government, pointing to our decision in *United States v. Viscome*, 144 F.3d 1365, 1370 (11th Cir. 1998), invites us to hold that Maxwell waived this argument because he raised it for the first time after the jury returned its verdict. Even if we found that the argument was not presented in the preconviction motion for judgment of acquittal, we could reach no such holding. In *Viscome*, appellant Gentile assailed the constitutionality of the statute under which he was charged for the very first time after he was found guilty. Gentile's motion containing this argument was untimely. *Id.* at 1370. Maxwell's written, renewed motion was not. Rule 29(c) permits defendants to file such motions "within 7 days after a guilty verdict." Fed. R. Crim. P. 49(d) specifies that papers filed in criminal cases must be "filed in a manner provided for in a civil action." In turn, Fed. R. Civ. P. 6(a) provides that weekends and legal holidays are excluded from the computation of filing deadlines of less than 11 days. Thus, Maxwell had seven business days to file his renewed motion. The jury returned guilty verdicts against him on May 7, 2003. Maxwell filed his motion on May 16, exactly seven business days later. The Government's response to Maxwell's renewed motion made no intimation that the argument was waived. The district court also correctly assumed that the constitutional argument was properly before it. For that reason,

United States v. Panfil, 338 F.3d 1299, 1300 (11th Cir. 2003).

Our discussion of this issue proceeds in three parts. First, we discuss the limited power of Congress as a general matter. Second, we weigh the four considerations the Supreme Court enumerated in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), for determining the extent of Congress's power to regulate "those activities having a substantial relation to interstate commerce." *Id.* at 610–12, 120 S. Ct. at 1749–51. In the third part, we conclude our analysis of Maxwell's as-applied challenge.

1.

"Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted." *United States v. Lopez*, 514 U.S. 549, 566, 115 S. Ct. 1624, 1633, 131 L. Ed. 2d 626 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405, 4 L.Ed. 579 (1819)). Accordingly, Congress can legislate only within the ambit of the specific powers the Constitution confers on it. The regulation of criminal activity in particular has long been regarded as a role reserved primarily to the states. *See, e.g.*, *Morrison*, 529 U.S. at 618, 120 S. Ct. at 1754 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and

---

the court addressed the issue squarely on the merits and explicitly found that "18 U.S.C. § 2252A(a)(5)(B) is constitutional on its face and as applied to Defendant Maxwell."

Since Maxwell raised his argument on time, *Viscome* is inapposite. His constitutional challenge was preserved for this appeal, and we must review it *de novo*.

reposed in the States, than the suppression of violent crime and vindication of its victims."); *id.* at 619 n.8, 120 S. Ct. at 1754 n.8 ("[T]he principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." (original alterations and quotation marks omitted)). Accordingly, "[u]nder our federal system the administration of criminal justice rests with the states except as Congress, acting within the scope of [its] delegated powers, has created offenses against the United States." *Screws v. United States*, 325 U.S. 91, 109, 65 S. Ct. 1031, 1039, 89 L. Ed. 1495 (1945) (plurality opinion).

Through the Child Pornography Prevention Act of 1996, Pub.L. No. 104–208, § 121, 110 Stat. 3009–26 (1996) (codified as amended in scattered sections of 18 U.S.C. ch. 110), and subsequent amendments, Congress has crafted an offense against the United States for the possession of child pornography, including such pornography that originated within a given state and remained there. Maxwell was convicted of this offense as it is codified in 18 U.S.C. § 2252A(a)(5)(B).

In this case, the Government established that Maxwell knowingly possessed child pornography in Florida. That pornography was saved on computer disks that had traveled from out-of-state before they contained illegal images. The Government proved nothing more. Apart from the origin of the disks (before they had been committed to nefarious purposes), Maxwell's case involved no apparent connection to activity beyond Florida. Yet, the Government contends that the power to enforce § 2252A against Maxwell stems from the authority provided to Congress by the Constitution's Commerce Clause. Pursuant to that clause, Congress

has authority "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3.

Time has borne out that the text of the Commerce Clause is no model of clarity. Consequently, the Supreme Court has struggled to define its boundaries. Since the early 1800s, the Court has emphasized that the power to regulate commerce is not a blank check:

> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95, 6 L.Ed. 23 (1824). In recent years, the Supreme Court has synthesized its voluminous Commerce Clause precedent and determined that the Clause authorizes Congress to regulate "three broad categories of activity":

> (1) "the use of the channels of interstate commerce";
>
> (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and

(3) "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."

Lopez, 514 U.S. at 558–59, 115 S. Ct. at 1629–30 (citations omitted). As the Supreme Court made clear in *Lopez*, Congress may regulate any channels or instrumentalities of interstate commerce. It may also regulate any person or thing in interstate commerce.

Its authority under the commerce clause is more limited, however, with respect to other subjects and activities, such as activities conducted entirely within a state's borders. Although Congress can undoubtedly regulate certain intrastate activity, its power extends over intrastate activity only if that activity bears a "substantial relation to interstate commerce," or as the Court clarified, if it "substantially affect[s] interstate commerce." *See id.* at 559, 115 S. Ct. at 1630 ("Within this final category, admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. . . . We conclude . . . that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."); *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002), *vacated by* 369 F.3d 1238 (11th Cir. 2004) (awaiting rehearing *en banc*) ("Whereas Congress may regulate *any* instrumentality or channel of interstate commerce, the Constitution permits Congress to regulate only those intrastate activities which have a *substantial* effect on interstate commerce, and such regulation of purely intrastate activity reaches the outer

limits of Congress' commerce power.").[14] Stated bluntly, wholly intrastate activities that have an only minimal or insubstantial effect on interstate commerce are not proper subjects for federal regulation, at least not through the power bestowed by the Commerce Clause.

2.

In this case, the challenged statute does not govern the "channels of interstate commerce," and the Government did not establish that the proscribed images were "things in interstate commerce." *Lopez*, 514 U.S. at 558, 115 S. Ct. at 1629. Rather the Government has prosecuted Maxwell for intrastate possession of child pornography and relies entirely for its convictions on the fact that the disks on which the pornography was copied traveled in interstate commerce before they contained the images. Therefore, if Congress has proscribed Maxwell's conduct pursuant to a "power[] granted to it," *id.* at 566, 115 S. Ct. at 1633 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 405), it must be because the intrastate possession child pornography falls within *Lopez*'s third category of activities that "substantially affect interstate commerce." *Cf. United States v. Adams*, 343 F.3d 1024, 1028 (9th Cir. 2003) ("Of course, the possession of child pornography [under § 2252] concerns neither the channels nor the instrumentalities of interstate commerce. It follows that the possession of child pornography must 'substantially affect interstate commerce' in order for Congress to regulate it under the Commerce Clause."); *United*

---

[14] We cite *Ballinger* on the strength of its reasoning only. Because the decision has been vacated and will be reheard by our full court, it is not the law of this circuit.

States v. Holston, 343 F.3d 83, 88 (2d Cir. 2003) (holding that assessing the constitutionality of a related statute, 18 U.S.C. § 2251(a), "requires us to determine whether, in light of the *Morrison* factors, the statute regulates an activity that 'substantially affects' interstate commerce"); *United States v. Corp*, 236 F.3d 325, 326 (6th Cir. 2001) (sustaining an as-applied challenge to § 2252 after applying only the test for *Lopez*'s third category of Commerce Clause regulation); *United States v. Rodia*, 194 F.3d 465, 474 n.3 (3d Cir. 1999) ("[W]e will consider the [18 U.S.C. § 2252(a)(4)(B)] only under [*Lopez*'s] category (iii), referring to the relevant inquiry in this case whether it was reasonable for Congress to believe that the behavior regulated substantially affects interstate commerce.").

The Supreme Court has articulated four considerations for determining whether an activity "substantially affects" interstate commerce such that it can be validly regulated through Commerce Clause legislation:

> 1) whether the statute in question regulates commerce "or any sort of economic enterprise"; 2) whether the statute contains any "express jurisdictional element which might limit its reach to a discrete set" of cases; 3) whether the statute or its legislative history contains "express congressional findings" that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated."

United States v. McCoy, 323 F.3d 1114, 1119 (9th Cir. 2003) (quoting *Morrison*, 529 U.S. at 610–612, 120 S. Ct. at 1750–51).

We analyze § 2252A's validity as applied to Maxwell's specific case in light of these four considerations, which we have reordered for convenience of discussion. The statute is constitutional in its application to Maxwell if "a rational basis existed for concluding that" the intrastate possession of child pornography produced with materials that traveled in interstate commerce "sufficiently affect[s] interstate commerce." *Lopez*, 514 U.S. at 557, 115 S. Ct. at 1629.

a.

Turning to *Morrison*'s first consideration, we discern nothing commercial or economic about the possession of child pornography, even if that pornography is saved on computer disks that were imported from out-of-state. The act of possession alone—the only act for which Maxwell was charged—entails no transactions, no consumption of goods or services, and no necessary resort to the marketplace.[15]

Maxwell's conduct can be sharply distinguished from the activity the Supreme Court found subject to Commerce Clause regulation in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942). In *Wickard*, an Ohio farmer challenged Congress's power to enact a 1941 amendment to the Agricultural Adjustment Act of 1938. *Id.* at 113, 63 S. Ct. at 83. As amended, the act assessed a "marketing penalty" against the farmer because he grew more wheat than the amount permitted by the act's marketing quota. *Id.* This quota "not only embrace[d] all that may be sold without

---

[15] We make no judgment today as to whether the distinct acts of producing, buying, selling, trading, warehousing, distributing, or marketing child pornography constitute economic or commercial activity.

penalty but also what may be consumed on the premises" of a given farm. *Id.* at 119, 63 S. Ct. at 86. The farmer sought a declaration that the act's quota provisions were unconstitutional as applied to him. *Id.* at 113–14, 63 S. Ct. at 83. He argued that the production and consumption of wheat are "beyond the reach of Congressional power under the Commerce Clause, since they are local in character and their effects upon interstate commerce are at most 'indirect.'" *Id.* at 119, 63 S. Ct. at 86. The Supreme Court disagreed. In reaching its decision, the Court explained,

> The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.

Id. at 115, 63 S. Ct. at 84. Thus, the challenged act constituted a civil scheme directed at controlling the cost and flow of rival goods in the marketplace. The Court's holding relied heavily on the statute's economic purpose and Congress's long-recognized authority to enact price regulations that affect the national market:

> It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market.

Id. at 128, 63 S. Ct. at 90–91 (footnote omitted). The Court concluded that even the growth and consumption

of wheat locally, if left unregulated, "would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." *Id.* at 129, 63 S. Ct. at 91.

The regulation at issue in Maxwell's case, by contrast, has no clear economic purpose. It makes no effort to control national trade by regulating intrastate activity. Instead, it attempts to regulate primary conduct directly, even within state borders. Unlike wheat, pornography is a nonrival good. Maxwell is charged with possessing it, and possessing pornography does not result in its consumption such that the overall supply of pornography in the market is reduced. In any event, Congress is clearly not concerned with the supply of child pornography for the purpose of avoiding surpluses and shortages or for the purpose of stimulating its trade at increased prices.

Nor does it seem that § 2252A represents a federal effort to reduce the trafficking of cameras, computers, staples, blank paper, film, or disks in interstate commerce. We are aware of no related regulation that prohibits the movement of these items when they are not committed to the purpose of producing child pornography. Congress's express findings in the Child Pornography Prevention Act of 1996[16] reveal no hint that Congress was concerned about the materials used to produce pornography or how those materials would impact interstate commerce. The statute provides no variation in punishment (or any other distinction for that matter) for pornography produced with very few materials transported in interstate commerce and

---

[16] We discuss these findings and related findings in greater detail in Part II.D.4, *infra*.

pornography produced with many such materials. Moreover, while the statute is constructed such that each item of child pornography a defendant possesses can serve as the basis for a separate conviction, it does not permit multiple convictions based on possession of a single item containing child pornography simply because that item was produced with numerous materials that traveled in interstate commerce.

These circumstances persuade us that Congress's reference in this statute to production materials smacks of pretext; the statute's true and core purpose is to criminalize the possession of child pornography. Thus, we conclude that regulated intrastate activity in this case is more similar by far to the brand of intrastate criminal conduct that is a proper subject for state regulation alone than it is to the sort of economic activity addressed in *Wickard*. *Cf. Morrison*, 529 U.S. at 618, 120 S. Ct. at 1754 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").

"[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to [the Court's] decision in that case." *Id.* at 610, 115 S.Ct. 1624, 120 S. Ct. at 1750. Here, the noneconomic, criminal nature of Maxwell's conduct is central to our decision.

b.

Morrison and *Lopez* also considered whether the regulated activity's substantial effect on interstate commerce was attenuated. The Court expressed reluctance to consider the long reaching, indirect effects of criminal acts on interstate commerce when assessing

the scope of Congress's power under the Commerce Clause. After all, if we were to weigh the "but-for causal chain" from the occurrence of crime, traced to "every attenuated effect on interstate commerce," then "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *See Morrison*, 529 U.S. at 615, 120 S. Ct. at 1752. The Court characterized this extended-causation approach as "unworkable if we are to maintain the Constitution's enumeration of powers." *Id.*

If Maxwell's conduct has had any effect on interstate commerce, that effect is attenuated to say the least. In the first place, we reiterate that there is nothing inherently commercial or economic about the mere possession of pornographic images. We also reemphasize the evident fact that the statute's jurisdictional element is directed at overcoming the legal hurdle of obtaining federal jurisdiction, rather than an aspect of the primary subject matter Congress wishes to control. This is not regulation of conduct to achieve price regulation or other economic ends; it is regulation of primary conduct, aimed at preventing Americans from engaging in certain activity under any circumstances. This circumstance alone necessarily attenuates the relationship between regulated conduct and interstate commerce to some degree. After all, § 2252A's own terms suggest that the very idea of interstate commerce is at least once removed from the regulated activity with which statute is truly concerned, i.e., the possession of child pornography.

The full extent to which the relationship is attenuated, however, becomes apparent only after looking, as we must, to Maxwell's specific conduct. As far

as interstate commerce is concerned, Maxwell has done nothing more than possess two disks that traveled from out-of-state. While possessing materials of production might conceivably have a direct impact on interstate commerce in certain circumstances, Maxwell's convictions present no such case. The causal chain necessary to link his activity with any substantial impact on interstate commerce might be long enough to reach the outer limits of the solar system.

The findings Congress announced with its initial enactment of § 2252A suggest in relevant part, first, that

> the existence of and traffic in child pornographic images . . . inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials . . . [and, second, that] prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children.

Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121, 110 Stat. 3009–27 (1996). Whether this explanation of how possessing child pornography can substantially affect interstate commerce is too attenuated as a general matter, we need not say. It is sufficient to remark that, on the facts of this case, there is simply no record evidence to suggest that Maxwell was

a potential child molester or that his conduct would likely increase the creation and distribution of child pornography elsewhere, much less to the extent that such creation and distribution would have a substantial effect on interstate commerce. The record is also devoid of evidence that Maxwell's possession of pornography would encourage others to possess such material in any direct or substantial manner.

Other circuits have concluded that the intrastate possession of child pornography has a direct impact on the national market for child pornography by looking beyond the isolated conduct of the defendant and considering the aggregate effect of such possession by others throughout the country.[17]

We believe this aggregate approach cannot be applied to intrastate criminal activity of a noneconomic

---

[17] *See, e.g., Holston*, 343 F.3d at 90 ("Since no one would doubt Congress's ability to regulate a national market in child pornography, the question becomes whether Congress could rationally have determined that it must reach local, intrastate conduct in order to effectively regulate a national interstate market. . . . [W]e conclude that Congress, in an attempt to halt interstate trafficking, can prohibit local production that feeds the national market and stimulates demand, as this production substantially affects interstate commerce." (citations and quotation marks omitted)); *United States v. Kallestad*, 236 F.3d 225, 230 (5th Cir. 2000) ("No one questions Congress's authority to regulate [the interstate market in child pornography] directly. . . . Applying the commerce power, read through the Necessary and Proper Clause, Congress can reach purely local possession if it rationally determines that doing so is necessary to effectively regulate the national market."); *Angle*, 234 F.3d at 338 ("[B]ecause § 2252(a)(4)(B) prohibits intrastate activity that is substantially related to the closely regulated interstate market of child pornography, we conclude that the statute is a valid exercise of Congress's Commerce Clause power.").

nature. Congress wields the power to regulate *inter*-state child pornography, not because such pornography has a substantial effect on interstate commerce in the aggregate, but because such pornography is a "thing[] in interstate commerce." *Lopez*, 514 U.S. at 558, 115 S. Ct. at 1629. A substantial effect need not be established for this sort of regulation, so the issue of aggregation is irrelevant. The opposite is true in the *intra*state context.

Aggregation was appropriate in *Wickard*, another case involving intrastate activity, because of the economic and commercial nature of the activity regulated. *See Morrison*, 529 U.S. at 611 n.4, 120 S. Ct. at 1750 n.4 ("In every case where we have sustained federal regulation under the aggregation principle in Wickard *v. Filburn* . . . the regulated activity was of an apparent commercial character."). But the Supreme Court has since remarked that "*Wickard* . . . is perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560, 115 S. Ct. at 1630. In *Lopez*, the Court contrasted the noneconomic nature of the Gun–Free School Zones Act of 1990 to the economic nature of the legislation at issue in *Wickard*:

> [The Gun–Free School Zones Act] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial

> transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561, 115 S. Ct. at 1630–31. Although the Supreme Court has not gone so far as to adopt "a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases," it has emphasized that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613, 120 S. Ct. at 1751; *cf. Ballinger*, 312 F.3d at 1270 ("The Constitution permits . . . aggregation of effects to justify congressional regulation of purely intrastate economic activity when the absence of such regulation would undercut a larger regulatory scheme affecting interstate commerce. No such aggregation of local effects is constitutionally permissible in reviewing congressional regulation of intrastate, *noneconomic* activity." (citation omitted)); *McCoy*, 323 F.3d at 1122 & n.17 (adopting the reasoning in *Ballinger*).

We have no intention of breaking new ground here. As the Supreme Court has warned, applying an aggregation approach to noneconomic, criminal activity when assessing its impact on interstate commerce would effect an interpretation of the Commerce Clause that essentially vests general police powers with the federal government. The aggregation principle, the Court reasoned,

> will not limit Congress to regulating violence[18] but may, as we suggested in *Lopez*, be applied equally as

---

[18] Although the *Morrison* majority repeatedly voiced doubts about the ability of Congress to regulate noneconomic, "violent" crimes, we perceive no reason why its rationale would not extend

> well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.

Morrison, 529 U.S. at 615–16, 120 S. Ct. at 1753.

As a practical matter, we note further that if the commercial import of general categories of noneconomic, criminal activities could be measured in the aggregate, jurisdictional hooks would be rendered irrelevant. Because the categorical activity of intrastate pornography would be invariably deemed to have a substantial economic effect on interstate commerce, Congress would not be constrained to proscribe its possession to cases in which the materials used to produce it were transported in interstate commerce. Thus, the misguided aggregation approach suggests that jurisdictional elements in all of Congress's Commerce Clause enactments amount to nothing more than superfluous hurdles to federal law enforcement.

Finally, we reiterate the risk Justice Thomas noted in his concurring opinion in *Lopez* that the aggregation approach could come packaged with an unwanted legislative byproduct. Permitting the validity of congressional action to be tested by the aggregate impact of the regulated activity encourages Congress not to use restraint in exercising its tremendous power, but instead to paint with a fatter regulatory brush. "[O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Lopez*, 514 U.S. at 600, 115 S. Ct. at 1650 (Thomas, J., concurring). Thus, if

---

with full force to equally noneconomic crimes of a nonviolent nature.

we adopted an aggregate methodology for assessing the effect of noneconomic, criminal activity on interstate commerce, and we then determined that the effect of child pornography was still insufficient, Congress could accomplish its aims by outlawing all pornography.[19]

By finding that Congress's power to regulate intrastate possession follows naturally from its power to regulate interstate possession, our sister circuits have taken two leaps. They first assume that intrastate possession affects the interstate market for child pornography. They then assume that this effect on the interstate market yields a substantial impact on interstate commerce. Whether or not a substantial effect on the interstate market for child pornography necessarily translates into a substantial effect on interstate commerce, we detect a flaw in their application of leap one. The effect on the interstate market—and ultimately interstate commerce—must be measured in relation to the isolated conduct at issue, rather than as a nationwide aggregate, because the intrastate possession of child pornography is a criminal, noneconomic activity.

One court has advanced an "addiction theory" as to why the intrastate possession of child pornography has a substantial impact on interstate commerce. Specifically, the Third Circuit, on reviewing the legislative history of § 2252, postulated that a person possessing intrastate child pornography could develop an increasing appetite for more such materials that eventually

---

[19] We acknowledge that this particular congressional response might be met with First Amendment hurdles, but we set that issue aside for the moment. Other activities that could be spiraled into expanding rings of regulation might not enjoy the protection of the Bill of Rights.

affects the interstate market substantially. *See Rodia*, 194 F.3d at 478–79. This theory, which was devised before *Morrison* came down, provides too attenuated a link to interstate commerce and would require us "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1634.

In sum, we review Maxwell's conduct independently and determine that its link to a substantial effect on interstate commerce, if any, is exceedingly attenuated.

c.

In *Morrison* and *Lopez*, the Supreme Court also considered the absence of a "jurisdictional element that would ensure, through case-by-case inquiry, that the" charged conduct "has the requisite nexus with interstate commerce." *Lopez*, 514 U.S. at 549, 115 S. Ct. at 1625. The Court noted that "[s]uch a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." *Morrison*, 529 U.S. at 612, 120 S. Ct. at 1751.

Of course not just any additional element of a crime can "ensure, through case-by-case" analysis that a given activity is constitutionally subject to regulation through the Commerce Clause, even if the element is cast in jurisdictional language. We decline the invitation to permit Congress to achieve power beyond its constitutional reach simply by uttering pretextual incantations evoking the phantasm of commerce. Obviously, Congress could not federalize the crime of murder by inserting statutory elements that are irrelevant to interstate commerce, such as obliging the

prosecution to show that the defendant has blue eyes. It follows that Congress cannot guarantee the proper the use of its authority by creating jurisdictional hooks that relate to interstate commerce in some way but fail in all cases to confine the scope of its regulation to Constitutional boundaries. This fact is obvious to the point of tautology: if a statute's jurisdictional element is not sufficiently restrictive to cabin the statute's reach to permissible applications, then the element is no guarantee of constitutional application. *See Kallestad*, 236 F.3d at 229 ("Where the relationship between the interstate and local activity is attenuated, a jurisdictional hook alone cannot justify aggregating effects upon interstate commerce to find Congressional power under the Commerce Clause."); *Rodia*, 194 F.3d at 473 ("A jurisdictional element is only sufficient to ensure a statute's constitutionality when the element either limits the regulation to interstate activity or ensures that the intrastate activity to be regulated falls within one of the three categories of congressional power."). Were the law otherwise, Congress could federalize the crime of murder by inserting a statutory element that requires the prosecution to prove that the defendant ate a cheeseburger that traveled in interstate commerce.

This case requires us to consider only the second of two jurisdictional hooks contained in § 2252A(a)(5) (B).[20] This hook enables the Government to obtain a federal conviction for the possession of child pornography upon

---

[20] We do not pass on the sufficiency of the statute's alternative jurisdictional showing, namely that the charged pornographic material itself "has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer." 18 U.S.C. § 2252A(a)(5)(B).

a showing that the charged pornography was "produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer." 18 U.S.C. § 2252A(a)(5)(B). The statute was applied to convict Maxwell for purely intrastate activity that could only fall within the third category of activities subject to Commerce Clause legislation. Consequently, the statute's jurisdictional hook only guarantees that Congress acted within the confines of its power in all applications of the statute if the hook requires the prosecution to prove, in substance, that Maxwell's criminal possession "*substantially* affect[s] interstate commerce." *Lopez*, 514 U.S. at 559, 115 S. Ct. at 1630 (emphasis added). We hold that the terms of the jurisdictional hook at issue fall short of demanding that showing.

As the Ninth Circuit reasoned with regard to an identical jurisdictional element in 18 U.S.C. § 2252(a)(4)(B), "[i]t not only fails to limit the reach of the statute to any category or categories of cases that have a particular effect on interstate commerce, but, to the contrary, it encompasses virtually *every* case imaginable, so long as any modern-day photographic equipment or material has been used." *McCoy*, 323 F.3d at 1124; *see also Rodia*, 194 F.3d at 473 ("As a practical matter, [§ 2252(a)(4)(B)'s] limiting jurisdictional factor is almost useless here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute."). We have struggled to conceive of a possessor of child pornography who would not be subject to federal prosecution if Maxwell is. We could

only imagine a possessor inhabiting an autonomous commune located in a single state. This hypothetical commune has developed its own technology, and has given form to that technology entirely from materials produced within its borders. That commune makes its own paper from its own pulp and has ingeniously constructed cameras from indigenous ingredients alone. Those same ingredients are used to make and develop bricolage film into pictures without assistance from the outside world. Unfortunately, even here in this industrious and self-sufficient society we encounter the cancer of exploitation. A member of the commune takes pornographic pictures of a child-resident. That pornographer, we conclude, would arguably be the only defendant beyond the reach of the federal government by the terms of the statute.[21]

In our collective experience, we know of no such communes. We strongly suspect that it would be impossible in today's world to develop a picture without utilizing a material, somewhere down the line, that originated beyond the borders of the state in which the picture was taken. We, thus, take heed of the Supreme Court's warning

> that the scope of the interstate commerce power "must be considered in the light of our dual system

---

[21] On the reasoning of some of our sister circuits, the possession of pornography, even when wholly intrastate, inherently affects interstate commerce. On this view (which we do not share), it seems that the origin of production materials is constitutionally irrelevant, and Congress thus has authority to regulate the intrastate possession of pornography more closely than it already has by the terms of § 2252A. Even the pornographer on the commune would be within federal reach if Congress should desire to reach so far.

> of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Lopez, 514 U.S. at 557, 115 S. Ct. at 1628–29 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S. Ct. 615, 624, 81 L. Ed. 893 (1937)).

We need not—and do not—hold today that there is absolutely no set of facts on which the intrastate possession of child pornography could have a substantial impact on interstate commerce. Nevertheless, we fail to comprehend, for instance, how the possession of an illegal magazine might substantially affect interstate commerce because it contains a foreign staple. Because we have no doubt that there are some instances in which a defendant can possess child pornography created with materials that traveled from out-of-state without substantially affecting interstate commerce, we conclude that § 2252A's jurisdictional hook is patently insufficient to ensure the statute's constitutional application in a case such as Maxwell's.

d.

Finally, *Morrison* directs us to consider whether § 2252A's legislative history contains express congressional findings regarding the effects on interstate commerce of possessing child pornography. The Court specified, however, that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614, 120 S. Ct. at 1752. We are not obliged

to conclude that a regulated activity substantially affects interstate commerce simply because Congress crafted findings stating that it does. *See id.*

> [W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.

Lopez, 514 U.S. at 557 n.2, 115 S. Ct. at 1629 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 366, 13 L. Ed. 2d 258 (1964) (Black, J., concurring)). In *Morrison*, in fact, the Supreme Court was unpersuaded by Congress's findings and noted that those findings relied "heavily on a method of reasoning we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Morrison*, 529 U.S. at 615, 120 S. Ct. at 1752.

Congress enacted the original version of § 2252A under the Child Pornography Prevention Act of 1996. Even this early version contained the jurisdictional hook at issue in this case. With the initial enactment, Congress made numerous findings, which we reproduce in the margin.[22] As explained in Part II.D.2.b *supra*,

---

[22] Congress finds that—

(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;

(2) where children are used in its production, child pornography permanently records the victim's abuse, and its con-

tinued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;

(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children "having fun" participating in such activity;

(4) child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer;

(5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;

(6) computers and computer imaging technology can be used to—

(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;

(B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and

(C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

(7) the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a

body engaging in sexually explicit conduct can haunt the minor for years to come;

(8) the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;

(9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;

(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and

(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials;

(11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and

(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of

little can be gleaned from these findings about the impact of child pornography on interstate commerce, and particularly the impact of possessing child pornography intrastate. Instead, the vast majority of the findings support the broader proposition that child pornography (even that which is generated by computer without actual people) is bad and harmful to children. We are prepared to take judicial notice of these points, but they aid us little in understanding how a federal prohibition on the intrastate possession of child pornography produced with interstate materials is a proper exercise of the Commerce Clause power.

Since its enactment, the statute has been amended several times. Findings related to the amendments should be viewed with caution because they do not necessarily reflect Congress's intentions at the time the

---

parents and families to encourage the sound mental, moral and emotional development of children;

(12) prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and

(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct.

Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121, 110 Stat. 3009–26–27 (1996).

original statute was enacted. *See, e.g., United States v. Price*, 361 U.S. 304, 313, 80 S. Ct. 326, 332, 4 L. Ed. 2d 334 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). At any rate, those findings shed little light on the present inquiry. The statute was amended, for example, pursuant to the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (Protect Act) of 2003, Pub. L. No. 108–21, 117 Stat. 650 (2003). Congress supplied additional findings with those amendments, but they did not address Congress's authority or, more importantly, the effect on interstate commerce of possessing child pornography intrastate.[23]

Other circuits upholding § 2252 (which contains a jurisdictional hook similar to the one in § 2252A, *see supra* note 11) against as-applied challenges have seized on legislative findings related to that statute. *See, e.g., Kallestad*, 236 F.3d at 229. These findings are particularly unreliable for our purposes since they were reached not only at a different time than when § 2252A

---

[23] Instead, the new findings were directed almost exclusively at concerns related to the Supreme Court's recent decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). That case held Congress violated the First Amendment in its efforts to proscribe all virtual child pornography (as contrasted to actual child pornography involving real children), including that which could not be defined as obscene according to Supreme Court precedent. *Id.* at 256, 122 S. Ct. at 1405 ("In sum, § 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.").

was enacted, but also reflect Congress's view of a different, albeit related, statutory provision. *Cf. Lopez*, 514 U.S. at 563, 115 S. Ct. at 1632 ("[I]mportation of previous findings to justify § 922(q) is especially inappropriate here because the prior federal enactments or Congressional findings [do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation." (alteration in original) (quotation marks and citation omitted)). The following finding in particular has been cited by other circuits:

> [C]hild pornography and child prostitution have become highly organized multimillion dollar industries that operate on a nationwide scale[, and] such prostitution and the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce . . . .

S. Rep. No. 95–438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 42–43.[24] Notably, this finding remarks only on interstate child pornography and teaches nothing about the effects of intrastate child pornography or noncommercial child pornography for that matter. *See McCoy*, 323 F.3d at 1127. For that reason, the Third Circuit, even in upholding the statute, indicated that it

---

[24] Comparable findings are referenced in the Historical and Statutory Notes to 18 U.S.C. § 2251 ("Congressional Findings") (quoting Pub. L. No. 99–500, § 702(1), 100 Stat. 1783–74 (1986); Pub. L. No. 99–591, § 702(1), 100 Stat. 3341–74 (1986); Pub. L. No. 98–292 § 2, 98 Stat. 204 (1984)).

was "troubled by the lack of express Congressional findings about the effect of intrastate possession of child pornography on interstate commerce." *Rodia*, 194 F.3d at 482. The Ninth Circuit concluded that "[a]t most, the legislative history here tells us that Congress intended to eliminate the interstate commercial child pornography market, and nothing more." *McCoy*, 323 F.3d at 1127.

Other aspects of § 2252's legislative history reveal some uncertainty about Congress's power to regulate intrastate activity at the time it enacted the statute. The Senate Judiciary Committee, for example, remarked that it was "well aware of the delicate balance that must be maintained between federal and state and local law enforcement efforts to curb criminal behavior. It is quite true that the general responsibility for dealing with criminal activity is normally not a matter of federal concern." S. Rep. No. 95–438, at 10. Nevertheless, the committee proceeded to express the view that state authorities could not adequately control child pornography on their own. While this comment reveals a congressional motive for regulation, it answers none of the concerns the committee voiced about the delicate balance between federal and state power.

Furthermore, as the Ninth Circuit observed, an appendix to the same Senate report also contained the United States Department of Justice's views about the legislation and suggested that the statute's enactment exceeded Congress's power. *McCoy*, 323 F.3d at 1128 (citing S. Rep. No. 95–438, at 25–26). Indeed, Assistant Attorney General Patricia Wald bluntly cautioned,

> In the first place, the bill is, in our opinion, jurisdictionally deficient.

. . . .

> . . . [T]he bill could cover a purely local act of child abuse in which there is, in fact, no filming or photographing and no possible effect on interstate or foreign commerce. The bill, therefore, would reach situations not properly cognizable under the Commerce Clause.

S. Rep. No. 95–438, at 25–26. The Department thus recommended that

> the investigation or prosecution of purely local acts of child abuse should be left to local authorities with federal involvement confined to those instances in which the mails or facilities of interstate commerce are actually used or intended to be used for distribution of the film or photographs in question.

Id. at 26.

It bears repetition that these serious doubts regarded the initial version of § 2252. That version did not even contain the expansive jurisdictional hook at issue in this case (i.e., the hook relating to pornography produced with materials that have been transported in interstate commerce). Furthermore, that statute was first enacted in 1978, roughly seventeen years before the Supreme Court's landmark decision in *Lopez*.

Recognizing that legislative history is an eclectic stew from which just about any vegetable can be extracted, we find nothing to persuade us that possessing child pornography produced with materials transported in interstate commerce is an activity that has a substantial effect on interstate commerce.

3.

In sum, our analysis of *Morrison*'s four considerations reveals no rational basis for concluding that the conduct for which Maxwell was convicted substantially affects or affected interstate commerce. Maxwell's activity was noneconomic and noncommercial in nature; its connection to interstate commerce was tenuous at best. Section 2252A's jurisdictional element requiring the government to establish that the illegal images were produced by materials that were transported in interstate commerce by no means ensures that the statute will be enforced only with regard to activity that has a substantial impact on interstate commerce. Lastly, the statute's legislative history provides no meaningful evidence that the intrastate possession of child pornography at issue in this case, although produced with two disks that traveled in interstate commerce, substantially affects interstate commerce. Consequently, § 2252A's application to Maxwell's conduct cannot be sustained as a valid exercise of Commerce Clause authority.

We believe *Morrison*'s framework produces the correct result in this case. It is difficult to imagine an activity more local in character than Maxwell's private possession of images within the confines of a single state (and perhaps, moreover, within a single home). The record shows that the Government did not allege or prove that Maxwell produced the pornography. It did not allege or prove that he purchased the pornography. It did not allege or prove that he traded or distributed the pornography or that he ever harbored any intention of doing so. It did not allege or prove that he consumed the pornography so as to affect its supply in the market. It did not allege or prove that his

possession encouraged him or others to seek more pornography so as to affect its demand in the market. It did not even allege or prove that he actually viewed the pornography. As such, it strains reason to conceive of how Maxwell's activity of possession was in any sense "commerce." Moreover, the Government did not allege or prove that Maxwell's pornography traveled from out-of-state. It did not allege or prove that the pictures were originally photographed out-of-state. In fact, the only testimony concerning the origin of any charged photograph suggests that it was taken in Florida. The Government did not allege or prove that Maxwell obtained the pornography through the use of the Internet, phone lines, or any other channel of interstate commerce or communication. It did not allege or prove that Maxwell took or intended to take the pornography out of the state, for commercial or personal use. As such, it strains reason to conceive of how Maxwell's activity of possession was in any sense "interstate." At the end of the day, the Government rested its entire case on one fact relating to the jurisdictional element: the disks on which the pornography was ultimately copied traveled, when blank, to Florida from someplace outside of Florida. We reject the Government's contention that this fact converts Maxwell's conduct into an activity subject to Commerce Clause regulation.[25]

---

[25] We note in passing that some of our sister circuits have reached a contrary result in comparable cases. Many of these cases were decided before the Supreme Court's decision in *Morrison*. *See, e.g.*, *Rodia*, 194 F.3d at 479 (holding "that Congress rationally could have believed that child pornography that did not itself travel in interstate commerce has a substantial effect on interstate commerce, and is thus a valid subject of regulation under the Commerce Clause"). Some entailed factual distinctions that might have had a serious impact on our analysis. *See, e.g.*,

Angle, 234 F.3d at 330–31 (Government supported charges of attempted receipt and possession of child pornography, 18 U.S.C. §§ 2252(a)(2), 2252(a)(4)(B), with evidence that defendant ordered pornography from a former commercial distributor via e-mail; Government supported charge of soliciting a minor to engage in sexually prohibited activity, 18 U.S.C. § 2422(b), with evidence that defendant had used the telephone and Internet in furtherance of his efforts). Yet others attributed a misplaced reliance to the presence of a jurisdictional hook like the one contained in § 2252A. *See, e.g., United States v. Hoggard*, 254 F.3d 744, 746 (8th Cir. 2001) (holding that a "jurisdictional nexus" similar to that in § 2252A "is sufficient to place [18 U.S.C. § 2251(b)] beyond constitutional attack"). Ultimately, we find that these decisions are inapplicable or, otherwise, unconvincing.

We are most persuaded by the Ninth Circuit's opinion in *McCoy*. In that case, the Ninth Circuit determined that 18 U.S.C. § 2252(a)(4)(B), a statute very similar to § 2252A(a)(5)(B), was unconstitutional as applied to a defendant who was convicted for possessing one image of child pornography displaying her and her daughter, side by side, with their genital areas exposed. *McCoy*, 323 F.3d at 1115, 1133. Federal jurisdiction for the defendant's prosecution "was premised upon the place of manufacture of the camera and film used to take the pictures." *Id.* at 1116. The court concluded

> that § 2252(a)(4)(B)'s application to the simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution or for economic or commercial use, including the exchange of the prohibited material for other prohibited material, cannot be justified under the Commerce Clause.

Id. at 1133; *see also Corp*, 236 F.3d at 326, 333 (holding that federal jurisdiction to prosecute a defendant for producing child pornography in violation of 18 U.S.C. § 2251(a) could not be based entirely on the fact that the photographic paper on which the pornography was printed was manufactured out-of-state). The district court in this case concluded that *McCoy* is inapposite because of its factual distinctions. We disagree. *McCoy* differed from this case in at least two respects. First, the defendant in

It could be argued that the considerations articulated above, by and large, have nothing to do with the elements of the statute. After all, § 2252A prohibits possession, not production, not travel, not trade or sale. This criticism cannot be overlooked. But neither can the fact that the terms of the Commerce Clause itself and the constitutional limitations on federal power are articulated outside the statute. Obviously, the validity of the statute's application in this case rests not on the satisfaction of its own requirements; rather, it rests on conformity with the restrictions built into the Constitution and the federalist government the Constitution establishes. The fact that the Constitution might require showings that a statute does not is no anomaly, but is instead an indispensable ingredient in the recipe for any statute that is facially valid but invalid as applied in particular cases. If the elements of the crime

---

McCoy was charged with possessing only one illegal image. *McCoy*, 323 F.3d at 1115. Maxwell was charged with possessing many. Second, the defendant in *McCoy* clearly produced the image, which depicted her own daughter. The Ninth Circuit found no "reason to believe that she had any interest in acquiring pornographic depictions of other children. There is thus no fungibility element present in cases such as hers." *Id.* at 1122. By contrast, there is no evidence that Maxwell's prurient interests were confined to particular children; he may well have regarded the images he possessed as fungible with other images. We believe that *McCoy* is instructive despite these distinctions. Its assessment of the tenuous "connection between the simple intrastate possession of child pornography and interstate commerce" seems applicable even where a defendant possesses numerous, fungible images. *Id.* at 1123–24 (reasoning that Congress's regulation of local crime on a theory of its aggregate effect on the national economy would invade the police powers reserved to the states). Its skepticism of the statute's jurisdictional hook and legislative history is likewise applicable, at least by analogy. *Id.* at 1124–29.

set forth in § 2252A required showings that were always sufficient to establish Congress's authority for its enactment and application, then every conviction under the statute would be valid (assuming that the statute never invaded overriding rights, such as that of free speech).

Our Nation's Founders were not naive about the risk of an all-encompassing central power, nor, it seems, did they ignore the possibility that the legislature might be tempted to overstep its bounds to legislate ideals favored by its constituencies. Federalism is no academic shibboleth. It is neither an inane legalism, nor an anachronous vestige of a bygone colonial era. The federalist system places a vital check on the power of the central government to trespass on our freedom. *See Morrison*, 529 U.S. at 616 n.6, 120 S. Ct. at 1753 n.6 ("[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."); *Lopez*, 514 U.S. at 576, 115 S. Ct. at 1638 (Kennedy, J., concurring) ("Though on the surface the idea [of federalism] may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572, 105 S. Ct. 1005, 1028, 83 L. Ed. 2d 1016 (1985) (Powell, J., dissenting))). Federalism ensures a role for the governments of the states and affords the voting public a more resonant voice in the debate over many legislative

issues of principally local concern. We decline today, with no small regret about the outcome in this case, to ignore that design, even in favor of strengthening the hand of federal law enforcement in the salutary aim of eradicating child pornography.

III.

For the foregoing reasons, Maxwell's convictions are REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14326-AA

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

JAMES MAXWELL, DEFENDANT-APPELLANT

[Filed: Dec. 28, 2004]

On Appeal from the United States District Court for the District of

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: EDMONDSON, Chief Judge, TJOFLAT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court

be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

File
(3) May 16, 2005

No. 04-1382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

JAMES MAXWELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

Dionja L. Dyer, *Counsel of Record*
Assistant Federal Public Defender
M. Allison Guagliardo
Assistant Federal Public Defender
Federal Public Defender's Office
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Fax: (813) 228-2562
Counsel for James Maxwell

QUESTION PRESENTED

Respondent respectfully submits the following as the question presented:

Whether 18 U.S.C. § 2252a(a)(5)(b), which prohibits the knowing possession of child pornography "that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce," is unconstitutional, as exceeding congress's commerce clause authority, as applied to respondent's intrastate possession of child pornography stored on computer disks that had traveled in interstate commerce before the disks contained any illegal images.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinion and Orders below 1

Statement 1

Reasons for Denying the Writ 6

Conclusion 15

TABLE OF CITATIONS

Cases: **Page(s)**

Sabri v. United States, 541 U.S. 600, 124 S. Ct. 1941 (2004) 11,12, 13

Ashcroft v. Raich, cert. granted, 124 S. Ct. 2909 (2004) (No.03-1454) 6, 14

Maryland v. Wirtz, 392 U.S. 183 (1968) 9

The Lottery Cases (Champion v. Ames), 188 U.S. 321 (1903) 11

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) ..... *passim*

Wickard v. Filburn, 317 U.S. 111 (1942) 4, 8

Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003) 14

United States v. Angle, 234 F.3d 326 (7th Cir. 2000) 9

United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003) 9

United States v. Riccardi,

___ F.3d ___, 2005 WL 896430 (10th Cir. Apr. 19, 2005) 13

United States v. Rodia, 194 F.3d 472 (3d Cir. 1999) 9

Constitution and Statutes:

U.S. Const. Art. I, § 8, cl. 3 6

18 U.S.C. § 2252A ..... *passim*

The Respondent, James Maxwell, respectfully requests that this Court deny the United States' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit concerning the court of appeal's constitutional holding in this case. Should this Court grant the United States' petition, Mr. Maxwell has submitted a conditional cross-petition for a writ of certiorari to review the judgment of the Eleventh Circuit.

OPINION AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 386 F.3d 1042. The order of the district court is unreported.

STATEMENT

Respondent was convicted of two counts of knowingly possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), following a jury trial before the U.S. District Court for the Middle District of Florida during May 2003. Count One of the indictment charged Mr. Maxwell with possession of a computer zip disk containing images of child pornography. Pet. App. 5a. Count Two charged Mr. Maxwell with possession of a computer floppy disk containing such images. Pet. App. 5a. The child pornography statute at issue proscribes the possession of images of child pornography "that has been mailed, or shipped or transported in interstate or foreign commerce," or "that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce." 18 U.S.C. § 2252A(a)(5)(B). In this case, the government solely relied on the latter jurisdictional hook. Pet. App. 3a. For this element, the government further solely relied on the stipulated fact that the disks charged had been "manufactured outside the State of Florida and have been mailed, shipped or transported in interstate commerce." Pet. App. 3a, 11a-12a. For his

convictions on Counts One and Two, Mr. Maxwell was sentenced to 66 months in prison. Pet. App. 12a & n.10.

The Eleventh Circuit, in an opinion authored by the Honorable Gerald B. Tjoflat, reversed Respondent's convictions. Pet. App. 1a-56a. The court of appeals first rejected Respondent's statutory interpretation of 18 U.S.C. § 2252A(a)(5)(B) that the child pornography was not "produced" using the computer disks. Pet. App. 15a-19a.[1] The court of appeals then reached, and ultimately agreed with, Respondent's constitutional argument that the application of this statute to Respondent's intrastate possession of child pornography exceeded Congress's authority, since the only connection to interstate commerce the government proved was that the charged disks had traveled in interstate commerce before the images were stored on them. Pet. App. 12a, 19a-56a.

1. The government's evidence showed that the two charged computer disks containing images of child pornography were found among Respondent's possessions in a packed room in a house in St. Petersburg, Florida. Pet. App. 4a-6a; Maxwell C.A. Br. 4. The government never proved that Respondent produced the images or that he had even viewed the images. Pet. App. 51a-52a. Additionally, the government never showed that Respondent purchased the images, traded the images, downloaded them from the Internet, or otherwise obtained them through the phone lines or any other channel of interstate commerce. Pet. App. 51a-52a.[2] Moreover, the only proof that the

---

[1] The Eleventh Circuit also rejected Mr. Maxwell's evidentiary arguments, Pet. App. 12a-13a, and his argument that the government had failed to provide sufficient evidence that he "knowingly" possessed child pornography, Pet. App. 13a-15a. Respondent has raised the statutory interpretation issue in his cross-petition for a writ of certiorari.

[2] While, as Petitioner notes (Pet. 4 n.1), agents found nine images of child pornography on the computer of Alberta Wallace, the government could not show who viewed them, and Defendant was not charged with possession of these images. Maxwell C.A. Br. 7-8.

government offered concerning the origin of an image showed that it was taken in Florida. Pet. App. 52a. Petitioner asserts that one of the minors in one of the images was from Texas, suggesting that the pornographic image had moved interstate; the government claims that it could not prove this fact since the witness could not identify the site where the photographs were taken. Pet. 12-13. The government also did not attempt to show, however, from where the photographs were obtained. The government made a choice to show a connection to interstate commerce by only proving that the two charged disks had traveled in interstate commerce before any images of child pornography were stored on them. Pet. App. 51a-52a.

2. The district court rejected Respondent's arguments that the government had not provided sufficient evidence that the images had been "produced" using the computer disks, and that "produced" did not include, as a matter of statutory interpretation, storing or saving images onto disks. The district court also rejected Respondent's arguments, timely raised in the district court (Pet. App. 20a & n.13), that the application of 18 U.S.C. § 2252A(a)(5)(B) exceeded Congress's powers under the Commerce Clause.

3. The Eleventh Circuit reversed based on Respondent's Commerce Clause argument. The Eleventh Circuit first considered the limits of congressional power, recognizing that Congress may only legislate within its enumerated powers and that "[t]he regulation of criminal activity in particular has long been regarded as a role reserved primarily to the states." Pet. App. 21a. The court then discussed the three categories of activity that Congress may reach under its Commerce Clause power, and noted that the government did not rely on Congress's authority over the channels of interstate commerce or the instrumentalities, persons, or things in interstate commerce. Pet. App. 23a-25a. Instead, the Eleventh Circuit considered whether Congress could reach Respondent's

intrastate possession on the grounds that it "substantially affect[s] interstate commerce." Pet. App. 25a (internal quotation marks omitted).

In considering the government's prosecution of this case, the court of appeals emphasized that the government solely relied on its proof that the disks had traveled in interstate commerce before the images were saved on them. Pet. App. 22a, 25a. As the Eleventh Circuit stated, "[The] pornography was saved on computer disks that had traveled from out-of-state before they contained illegal images. The Government proved nothing more. Apart from the origin of the disks (before they had been committed to nefarious purposes), Maxwell's case involved no apparent connection to activity beyond Florida." Pet. App. 22a.

The Eleventh Circuit then applied the four factors outlined in this Court's opinion in *United States v. Morrison*, 529 U.S. 598 (2000). Pet. App. 21a, 26a-56a. Considering the first factor, the court of appeals found nothing commercial or economic about the Respondent's possession, since the "act of possession alone – the only act for which Maxwell was charged – entails no transactions, no consumption of goods or services, and no necessary resort to the marketplace." Pet. App. 27a. Instead, the court found that Congress's resort to the relationship between the materials that were used to produce the image (such as cameras, film, and disks) and interstate commerce "smack[ed] of pretext," since Congress's "true and core purpose is to criminalize the possession of child pornography." Pet. App. 29a-30a. Distinguishing the activity at issue in *Wickard v. Filburn*, 317 U.S. 111 (1942) – where this Court "relied heavily on the statute's economic purpose and Congress's long-recognized authority to enact price regulations that affect the national market," Pet. App. 28a – the Eleventh Circuit concluded that the "regulated intrastate activity in this case is more similar by far to the brand of intrastate criminal conduct that is a proper subject for state regulation

alone than it is to the sort of economic activity addressed in *Wickard*." Pet. App. 30a. The Eleventh Circuit echoed this Court's holding in *Morrison* in stating that "the noneconomic, criminal nature of Maxwell's conduct is central to our decision." Pet. App. 30a.

The Eleventh Circuit next considered the fourth *Morrison* factor and found that if Respondent's "conduct has had any effect on interstate commerce, that effect is attenuated to say the least." Pet. App. 31a. The court specifically noted that in this case the only connection between Respondent's conduct and interstate commerce was possessing "two disks that traveled from out-of-state." Pet. App. 32a. The government had not shown any evidence that Respondent was a potential child molester, that his conduct would increase the supply and distribution of child pornography, or that his possession would encourage others to possess such images. Pet. 32a-33a. Because Respondent's activity was noneconomic and noncommercial, the court of appeals, citing *Morrison* and *Lopez*, found that aggregation of effects was not appropriate. Pet. 33a-35a. The court made it explicit that it had "no intention of breaking new ground here," and heeded this Court's warning that "applying an aggregation approach to noneconomic, criminal activity when assessing its impact on interstate commerce would effect an interpretation of the Commerce Clause that essentially vests general police powers with the federal government." Pet. App. 35a.

Considering the second *Morrison* factor, the Eleventh Circuit found that the jurisdictional hook in 18 U.S.C. § 2252A(a)(5)(B) failed to ensure that the statute would be applied only to cases within Congress's Commerce Clause authority. Pet. App. 38a-42a. The Eleventh Circuit, like other circuits, found that this jurisdictional hook provided no meaningful limit to federal jurisdiction, since it was difficult to conceive of images that would be produced with technology that had not traveled in interstate commerce. Pet. App. 40a-41a. The court therefore concluded that the "jurisdictional

book is patently insufficient to ensure the statute's constitutional application in a case such as Maxwell's." Pet. App. 42a.

The Eleventh Circuit lastly considered the third *Morrison* factor and concluded that the legislative history contained little in the way of findings on the effect of child pornography on interstate commerce, and instead reflected findings that child pornography is "is bad and harmful to children." Pet. App. 46a. The court ultimately found that there was nothing in the legislative history "to persuade [the court] that possessing child pornography produced with materials transported in interstate commerce is an activity that has a substantial effect on interstate commerce." Pet. App. 50a.

REASONS FOR DENYING THE WRIT

The judgment of the Eleventh Circuit does not warrant this Court's review. The judgment rests on a highly fact-specific application of this Court's settled precedents concerning Congress' power under the Commerce Clause, U.S. Const. Art. I, § 8, cl.3. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). In this case, the government made the decision to rest its constitutional argument on the incredibly broad theory that Congress has constitutional power to criminalize any action taken using a computer disk that previously traveled in interstate commerce. The court of appeals properly rejected that theory, and nothing in *Ashcroft v. Raich, cert. granted*, 124 S. Ct. 2909 (2004) (No. 03-1454) is likely to change that.

1. The Eleventh Circuit's decision is not erroneous and does not "seriously undermine[] Congress's comprehensive scheme to eliminate the interstate market in child pornography." Pet. 8. Instead, the court of appeals' decision merely applies this Court's holdings in *Lopez* and *Morrison* to determine that, based on the facts of the instant case, the application of the statute exceeded

Congress's authority under the Commerce Clause. Pet. App. 21a, 51a-52a. The only connection to interstate commerce that the government alleged, and chose to prove, was that the disks on which the child pornography was saved had traveled, when blank, in interstate commerce. Pet. App. 22a, 25a, 31a-32a, 51a-52a. The government's failure to prove the connection between Respondent's conduct and interstate commerce was determinative to the Eleventh Circuit's holding. Pet. App. 51a-52a. This decision is therefore limited to its facts and does not represent a serious challenge to Congress's comprehensive regulatory scheme concerning an interstate market of child pornography.

a. Congress's powers are limited to those that are enumerated in the U.S. Constitution *Lopez*, 514 U.S. at 552. Petitioner asserts that within the Commerce Clause authority, Congress may "regulate an entire class of activities that substantially affects interstate commerce, even if the commercial effect of an individual instance within the class is slight." Pet. 9. Because the Respondent's possession of child pornography was only an intrastate, noneconomic and noncommercial activity, Congress's power under the Commerce Clause over this case cannot be sustained. *See Morrison*, 529 U.S. at 611 ("*Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."); *Lopez*, 514 U.S. at 559-60 (providing examples of such cases and indicating that "the pattern is clear[:] [w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained") (emphasis added).

Petitioner appears to concede that the possession in this case was not commercial, and instead contends that Congress may reach even non-commercial intrastate activity "if regulation of that activity is reasonably necessary to achieve Congress's regulatory objectives with respect to an

interstate market," citing this Court's opinion in *Wickard v. Filburn*, 317 U.S. 111 (1942). Pet. 10. The distinguishing factor of the instant case is not that Respondent's contribution to or effect on an interstate market in child pornography was slight, but that it was not proven at all. Pet. App. 1a-56a. The only fact that the government proved was that Respondent possessed two computer disks containing child pornography within a single room in a house in St. Petersburg, Florida. The only origin of an image proven at trial was that it was taken in Florida. As the Eleventh Circuit found, unlike *Wickard*, Respondent's activity, the possession of images of child pornography, was not economic in nature and did not compete with the supply of child pornography in the market. Pet. App. 27a ("The act of possession alone – the only act for which Maxwell was charged – entails no transactions, no consumption of goods or services, and no necessary resort to the marketplace."). The government relied only on the fact that the disks had traveled in interstate commerce before the images were stored on them. Thus, the connection between interstate commerce and the disks had ended before the criminal activity at issue in this case.

Wickard's aggregation principle is therefore inapplicable. *See Morrison*, 529 U.S. at 611 n.4 ("[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn* . . . the regulated activity was of an apparent commercial character."); *id.* at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *Lopez*, 514 U.S. at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."). In the instant case, the government never

demonstrated any connection between the Respondent's activity and interstate commerce, let alone a substantial connection. *See Morrison*, 529 U.S. at 610 ("But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."); *Lopez*, 514 U.S. at 557-58 (discussing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968), and stating that "[n]either here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities....Rather, '[t]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'") (citations and emphasis omitted).

Petitioner does not address the other three factors outlined in *Lopez* and *Morrison* in its argument. Considering the second factor, the Eleventh Circuit correctly joined other circuits in rejecting the argument, or expressing doubt, that the jurisdictional hook in 18 U.S.C. § 2252A(a)(5)(B) and similar statutes ensures that the statute reaches only those activities within Congress's Commerce Clause power. Pet. App. 38a-42a; *United States v. Rodia*, 194 F.3d 465, 472-73 (3rd Cir. 1999); *United States v. Angle*, 234 F.3d 326, 337 (7th Cir. 2000); *United States v. McCoy*, 323 F.3d 1114, 1124-27 (9th Cir. 2003); *cf. Lopez*, 514 U.S. at 562 ("[Section] 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an *explicit connection* with or effect on interstate commerce.") (emphasis added); *id.* at 567 (holding Section 922(q) unconstitutional, noting "there is no requirement that [defendant's] possession of the firearm have any *concrete* tie to interstate commerce") (emphasis added). Indeed, the only connection between interstate commerce and Respondent's activity in this case was that the disks on which the child pornography ultimately was stored had been manufactured

outside the State of Florida and had been mailed, shipped, or transported in interstate commerce. The government never proved that the Respondent purchased the images, traded the images, or obtained the images from channels of interstate commerce. The government never proved that the Respondent ever viewed the images, or that he was even the one who loaded the images onto the disks (the items that actually traveled in interstate commerce).[3] The jurisdictional hook therefore fails to ensure that the statute only reaches conduct falling within Congress's Commerce Clause powers.

The Eleventh Circuit also correctly found that the legislative history did not evidence findings regarding the effects of intrastate possession of child pornography on interstate commerce. Pet. App. 42a-50a. While noting that ultimately this determination is for the judiciary, not the legislative, branch (Pet. App. 43a (citations omitted)), the Eleventh Circuit properly concluded that the legislative history failed to show that activity such as Respondent's has a substantial effect on interstate commerce. Additionally, the legislative history of an earlier child pornography statute reveals that the United States, even before *Lopez* and *Morrison*, has taken a different position than the one asserted here. The U.S. Department of Justice's views on the pending legislation were reported as follows:

> [T]he investigation or prosecution of purely local acts of child abuse should be left to local authorities *with federal involvement confined to those instances in which the mails or facilities of interstate commerce are actually used or intended to be used for distribution of the film or photographs in question.*

---

[3] Whether "produced" under 18 U.S.C. § 2252A(a)(5)(B) includes storing or reproducing on computer disks is addressed in Respondent's cross-petition. It is important to note here, however, that the government did not prove that *Respondent* stored or saved images onto disks.

Pet. App. 50a (quoting statement of Assistant Attorney General Patricia Wald) (citation omitted) (emphasis added). In the instant case, that the computer disks on which the images were stored had moved in interstate commerce is simply too attenuated to support congressional authority under the Commerce Clause over this case of intrastate possession of child pornography.

Finally, the Eleventh Circuit properly considered the fourth *Morrison* factor and found that the connection between Respondent's conduct and interstate commerce was too attenuated. Pet. App. 30a-38a. While Congress may have had a laudatory goal of eradicating the possession of child pornography, Congress does not possess general police power. *Morrison*, 529 U.S. at 617-19. Nothing prevents state authorities from regulating the very activity at issue here. *See Lopez*, 514 U.S. at 561 n.3. Respondent therefore asserts that the Eleventh Circuit appropriately considered the four factors outlined in *Morrison*, and the petition should therefore be denied.

b. Petitioner's attempt to justify congressional power under the Commerce Clause in this case by arguing that Congress can eradicate an entire market in child pornography is unavailing. Pet. 11. Petitioner cites *The Lottery Cases* (*Champion v. Ames*), 188 U.S. 321 (1903) and *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 1946 (2004). Pet. 11. In *The Lottery Cases*, however, this Court upheld congressional authority to legislate, under the Commerce Clause, the carrying of lottery tickets from one state to another. Thus, by the terms of the statute, the subject of the crime moved, and was an instrumentality, in interstate commerce. *See* 188 U.S. at 363-64. Notably, this Court, in addressing an argument raised under the Tenth Amendment, stated:

> Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states. . . . As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce

BEST AVAILABLE COPY

which concerns all the states, may prohibit the carrying of lottery tickets from one state to another.

188 U.S. at 357.

Petitioner's reliance on *Sabri* is equally unavailing. In *Sabri*, this Court addressed Congress's power under the Spending Clause to proscribe "bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds." 124 S. Ct. at 1944. This Court rejected the defendant's reliance on *Lopez* and *Morrison*, finding that "[t]he power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place, and Sabri would be hard pressed to claim, in the words of the *Lopez* Court, that § 666(a)(2) 'has nothing to do with' the congressional spending power." *Id.* at 1947 (citing *Lopez*, 514 U.S. at 561).

Petitioner further claims that "in light of the potential difficulty of proving that a particular pornographic image has traveled across state lines," the Eleventh Circuit's holding is misconceived. Pet. 12-13. Even assuming, for the moment, that the government has some difficulty in establishing where a particular image was taken, such a difficulty does not justify a lessened standard for ensuring that the application of a federal statute is constitutional and that the federal government does not intrude on matters reserved to the states. Moreover, Respondent respectfully submits that the problem for the government in this case was that the government chose to rely solely on the fact that the computer disks had traveled in interstate commerce, when blank, believing that to be a sufficient interstate nexus. Pet. App. 52a. The government did not attempt to show any other connection to interstate commerce. Therefore, it is not clear that the government truly suffered from an inability to prove that the images had traveled in interstate commerce, but from the failure even to attempt to prove this fact.

The result of the case is thus a direct reflection of the government's choice not to provide sufficient evidence of a substantial connection between the Respondent's activity and interstate commerce. As the Eleventh Circuit stated at length:

> We believe *Morrison*'s framework produces the correct result in this case. It is difficult to imagine an activity more local in character than Maxwell's private possession of images within the confines of a single state (and perhaps, moreover, within a single home). The record shows that the Government did not allege or prove that Maxwell produced the pornography. It did not allege or prove that he purchased the pornography. It did not allege or prove that he traded or distributed the pornography or that he ever harbored any intention of doing so. It did not allege or prove that he consumed the pornography so as to affect its supply in the market. It did not allege or prove that his possession encouraged him or others to seek more pornography so as to affect its demand in the market. It did not even allege or prove that he actually viewed the pornography. As such, it strains reason to conceive of how Maxwell's activity of possession was in any sense "commerce." Moreover, the Government did not allege or prove that Maxwell's pornography traveled from out-of-state. It did not allege or prove that the pictures were originally photographed out-of-state. In fact, the only testimony concerning the origin of any charged photograph suggests that it was taken in Florida. The Government did not allege or prove that Maxwell obtained the pornography through the use of the Internet, phone lines, or any other channel of interstate commerce or communication. It did not allege or prove that Maxwell took or intended to take the pornography out of the state, for commercial or personal use. As such, it strains reason to conceive of how Maxwell's activity of possession was in any sense "interstate." *At the end of the day, the Government rested its entire case on one fact relating to the jurisdictional element: the disks on which the pornography was ultimately copied traveled, when blank, to Florida from someplace outside of Florida. We reject the Government's contention that this fact converts Maxwell's conduct into an activity subject to Commerce Clause regulation.*

Pet. App. 51a-52a (emphasis added).

2. Despite Petitioner's characterizations (Pet. 8, 13), this case is limited to a specific set of facts (Pet. App. 19a-56a), as the Tenth Circuit recently recognized. *See United States v. Riccardi*, ___ F.3d ___, 2005 WL 896430, *12 (10th Cir. Apr. 19, 2005) (citing *Maxwell* and stating that it "involved factual circumstances with much more tenuous connections to interstate commerce than the facts presented here"); *see id.* at *12 n.2 ("The holding of the [*Maxwell*] case, nonetheless, is

limited to facts in which the only nexus to interstate commerce is that the images were copied onto blank computer disks which had traveled in interstate commerce."). The government never showed that Respondent purchased, traded, downloaded, or sought to prove how he otherwise came to possess the images. The government never showed that Respondent "produced" or stored the images on the disks that had traveled in interstate commerce. The government, moreover, never proved that Respondent had ever even viewed the images. The Eleventh Circuit correctly found that this application was unconstitutional considering the four *Morrison* factors.

Finally, Petitioner requests that this Court hold this petition pending the Court's decision in *Ashcroft v. Raich, cert. granted*, 124 S. Ct. 2909 (2004) (No. 03-1454), contending that the two cases have common features. Pet. 14. *Raich* involves a civil suit for injunctive and declaratory relief based a state's attempt to exempt an entire class of persons or activity, defined as the noncommercial personal possession of marijuana for medicinal purposes, from federal prosecution under the Controlled Substances Act. *Raich v. Ashcroft*, 352 F.3d 1222, 1224-25, 1228 (9th Cir. 2003). Thus, the issue in *Raich* is whether the state may provide an exemption for an entire class of persons from federal prosecution. Of course, if an individual fails to meet the requirements of the exemption, the federal and local authorities would not be prevented from prosecuting those individuals. *See id.* at 1225-26. For those people who meet the requirements, however, the state is attempting to save those individuals from prosecution.

The issue in the instant case raises a different set of concerns. The Eleventh Circuit's decision does not exempt out an entire class of individuals or activities from federal prosecution. Instead, the Eleventh Circuit's decision was based on the fact that the government in this case failed to prove a substantial connection between Respondent's activity and interstate commerce. The court

of appeals therefore found that the prosecution of this case should have been left to the state, in accordance with federalism concerns. Pet. App. 55a-56a. In this respect, the Eleventh Circuit's opinion addressed where Respondent could be prosecuted consistent with the balance between the federal and state governments, not whether he could be prosecuted at all. Therefore, it is unlikely that this Court's decision in *Raich* would alter the outcome of this case.

CONCLUSION

For the reasons stated herein, Mr. Maxwell respectfully requests that the petition for a writ of certiorari seeking review of the Eleventh Circuit's judgment in this case be denied.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

M. Allison Guagliardo
for Dionja L. Dyer, *Counsel of Record*
Assistant Federal Public Defender

M. Allison Guagliardo
Assistant Federal Public Defender
400 North Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Fax: (813) 228-2562

Supreme Court, U.S.
FILED
JUL 15 2005
OFFICE OF THE CLERK

(2)

No. 04-1382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES MAXWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 04-1382

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES MAXWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

On June 6, 2005, after the petition for a writ of certiorari and respondent's brief in opposition to the petition were filed, this Court issued its decision in *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005). The Court's decision in *Raich* reinforces the constitutionality of 18 U.S.C. 2252A(a)(5)(B) by reaffirming the central arguments the United States has advanced in defense of that provision. The Court therefore should grant the petition for certiorari in this case, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Raich*. Indeed, the Court has already taken that action with regard to another recent Eleventh Circuit decision, involving a related provision

of the federal child-pornography laws, that relied on the court of appeals' decision in this case.*

1. Respondent contends that the court of appeals' decision "rests on a highly fact-specific application of this Court's settled precedents concerning Congress' power under the Commerce Clause." Br. in Opp. 6; *id.* at 6-15. As the government's petition for a writ of certiorari explains (at 13-14), however, "the decision in this case is not limited to idiosyncratic factual settings; rather, this case involves the core conduct that Congress sought to prohibit in enacting Section 2252A(a)(5)(B)." Respondent possessed computer disks containing hundreds of pornographic images of minors to whom he had no evident personal connection. See Pet. 14. By eliminating the statute's application to an important class of prohibited conduct—the intrastate possession of child pornography for purported personal use—the decision below seriously undermines Congress's comprehensive scheme for eliminating the interstate market in child pornography.

The Eleventh Circuit has not treated its decision in this case as limited to a narrow set of facts. In *United States* v. *Smith*, 402 F.3d 1303 (11th Cir. 2005), vacated and remanded, No. 04-1390 (June 20, 2005), the court reversed the defendant's conviction for producing child pornography, in violation of 18 U.S.C. 2251(a). The defendant in *Smith* had paid a 14-year-old girl to pose for sexually explicit photographs. See, *e.g.*, 402 F.3d at 1310-1311. The court of appeals held that its decision in this case compelled the conclusion that Smith's conduct was beyond the power of Congress to regulate—indeed,

* The government's petition for a writ of certiorari in this case urged (at 14-16) that the petition be held pending the Court's decision in *Raich* and then disposed of as appropriate in light of that decision.

the court found that conclusion to be so plain and obvious that it reversed the conviction on plain-error review, notwithstanding Smith's failure to assert his constitutional challenge in the district court. See *id.* at 1323-1325; see also *United States* v. *Matthews*, No. 04-11052 (11th Cir. Apr. 11, 2005) (per curiam) (holding, based on the court of appeals' decisions in this case and in *Smith*, that the defendant's indictment for intrastate possession and production of child pornography was properly dismissed), petition for cert. pending, No. 05-59 (filed July 8, 2005).

2. The question presented in *Raich* was "[w]hether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, exceeds Congress's power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported personal 'medicinal' use or to the distribution of marijuana without charge for such use." 03-1454 Pet. at I. Relying substantially on *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (see 125 S. Ct. at 2206-2208), the Court in *Raich* rejected the respondents' as-applied constitutional challenge to the federal ban on possession and distribution of marijuana. The Court in *Raich* reaffirmed that the constitutional analysis must take into account the entire class of regulated activities. *Id.* at 2205-2206. The Court further explained that, under *Wickard*, "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 2206. The Court also held that, "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about di-

version into illicit channels, * * * Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Id.* at 2209 (citation and footnote omitted).

As the petition for a writ of certiorari in this case explains (at 11-13, 14-15), the same considerations support Congress's decision not to exempt the intrastate possession of child pornography for purported personal use from the prohibition contained in 18 U.S.C. 2252A(a)(5)(B). Like the ban on intrastate possession of marijuana, Section 2252A(a)(5)(B) is an integral feature of a comprehensive statutory scheme intended to attack the national market in a noxious commodity. And, as with marijuana, the reasonableness of Congress's enforcement regime is supported by the potential difficulty of proving that a particular visual depiction has previously moved in interstate commerce (or that it is possessed with the intent to sell or otherwise distribute it).

On June 20, 2005, this Court granted the government's petition for a writ of certiorari in *Smith*, vacated the judgment of the court of appeals, and remanded the case to the Eleventh Circuit for further consideration in light of the decision in *Raich*. There is no reason for a different disposition here.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision in *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JULY 2005